89-1516

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOE FRANK HARRIS, Governor, et al.,

Petitioners,

v.

HORACE LUCKEY, III, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is consistent with the Eleventh Amendment and traditional concerns of equity, comity and federalism, for a United States district court to entertain an action to compel a State to restructure its internal operations and assume direct funding and supervisory responsibility over a governmental function or activity (in this instance indigent criminal defense services) which historically has been provided at the local level.

2. Whether respondents have presented a viable and justiciable claim for injunctive relief to prevent anticipated future Sixth Amendment *"effectiveness* of counsel" or *"adequacy* of defense services" violations.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Plaintiffs-Appellants

Horace Luckey, III (an indigent criminal defendant),

Beverly Cannon (an indigent criminal defendant),

M. V. Booker (an attorney for indigent criminal defendants),

William F. Braziel, Jr. (an attorney for indigent criminal defendants),

G. Terry Jackson (an attorney for indigent criminal defendants),

Joseph Saia (an attorney for indigent criminal defendants), and

Charles Thornton (an attorney for indigent criminal defendants),

on their own behalf and on behalf of all persons similarly situated.

Defendants-Appellees

Joe Frank Harris, Governor,

Hon. Robert J. Noland, Chief Judge of Douglas Judicial Circuit, and

Hon. Joe E. Crumbley, Chief Judge of Clayton Judicial Circuit,

on their own behalf and on behalf of all others similarly situated.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Joe Frank Harris, Governor, Hon. Robert J. Noland, Chief Judge of Douglas Judicial Circuit, and Hon. Joe E. Crumbley, Chief Judge of Clayton Judicial Circuit, on their own behalf and on behalf of all other similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on November 23, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit which reversed the district court's dismissal of respondents' action is reported as *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). The Court of Appeal's denial of petitioners' suggestion of rehearing *en banc*, is reported as *Luckey v.*

Harris, 893 F.2d 1341 (11th Cir. 1989). A not yet reported dissenting opinion to this denial, joined in by the Chief Judge and three circuit judges of the Court of Appeals, is included in the Appendix.

The district court's initial decision, dismissing respondents' action on the ground that it was in substance a suit against the State of Georgia barred by the Eleventh Amendment, was entered on June 24, 1987. It too is unreported but included in the Appendix. On September 30, 1987, the district court entered an order (unreported) granting respondents' motion to reconsider.

On December 31, 1987, following further briefing by the parties on reconsideration, the district court entered its second order of dismissal (unreported), this time holding that even if the Eleventh Amendment did not bar the action, respondents' suit for prospective injunctive relief, based upon anticipated future "effectiveness" of counsel and "adequacy" violations failed to state a claim upon which relief could be granted.

All of the above opinions, orders and judgments of the Court of Appeals and district court, reported and unreported, are set forth in the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 23, 1988, with the order of that Court denying petitioners' suggestion of *en banc* rehearing being entered on December 29, 1989. This petition for a writ of certiorari is filed within ninety days of the Court of Appeals' denial of *en*

banc rehearing. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const., Amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Historically, indigent criminal defense services in Georgia have been arranged for and funded at the local level of government (i.e. by counties and cities). Whether through the public defender office of an urban area, the appointment system common to less densely populated areas, or by the less frequently used contract system for legal services, it has never been questioned but that indigent criminal defendants in Georgia are routinely provided with assistance of counsel as well as various other

indigent criminal defense services.[1] Respondents note in their complaint that the Supreme Court of Georgia has adopted Uniform Rules for the Superior Courts which in specifying procedures for indigent defense services provide, *inter alia*, that criminal defendants:

> shall receive notice of the right to counsel, timely appointment of counsel and information about the procedure for that appointment.

What this case is about, in other words, is not "whether" but "how much." It is respondents' contention that the traditional system of local governmental control and funding of indigent criminal defense services in Georgia is "systemically" defective. They say it fails to make sufficiently "effective" assistance of counsel available, or to provide for other necessary services at that level of adequacy which they contend is required to meet constitutional norms respecting assistance of counsel and a fair trial under the Sixth and Fourteenth Amendments. In what is essentially a "funding" suit, respondents allege in their complaint that expenditures for indigent criminal defense services in Georgia are "far below the national

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[1] These locally operated and funded systems for the delivery of indigent criminal defense services are authorized by the Georgia Criminal Justice Act, O.C.G.A. §§ 17-12-1 through 17-12-14. Other enactments of the General Assembly of Georgia relating to the defense of indigents include O.C.G.A. § 17-12-60, *et seq.*, dealing with the defense of indigents in capital cases, and O.C.G.A. § 17-12-70, *et seq.*, relating to the establishment of public defender offices in counties with a population of 550,000 or more. Georgia law expressly recognizes the "inherent power" of its courts to appoint counsel to represent indigent defendants and order compensation and reimbursement from *county* funds in individual cases as the proper administration of justice may require. O.C.G.A. § 17-12-44.

average on a per case basis" and "far below the amount needed to provide constitutionally adequate services." Inadequate remuneration for counsel appointed to represent indigent criminal defendants is said to result in "a financial disincentive for defense counsel to provide thorough and effective defense services consistent with minimum standards of representation." Respondents contend that the Uniform Rules promulgated by the Supreme Court of Georgia concerning timely appointment of counsel "have not yet been followed or complied with by counties in Georgia," and that there are consistent delays in the initial appointment of counsel as well as an over-reliance on inexperienced counsel under the locally funded and controlled system. It is the position of respondents that *the State of Georgia's* failure to restructure its internal governmental organization in the area and assume direct state-level funding and supervisory control responsibility, constitutes a failure on the part of Georgia to meet its constitutional obligations under the Sixth and Fourteenth Amendments to the United States Constitution.

It appears from respondents' complaint that at least one thing which may have precipitated their suit is the fact that the General Assembly of the State of Georgia has enacted but failed to fund legislation, the "Indigent Criminal Defense Act," O.C.G.A. §§ 17-12-30 through 17-12-44. This Act authorizes *State* financial assistance for indigent criminal defense services in counties electing to participate, and would provide for a measure of state-level supervision of indigent criminal defense services in connection with the state-level funding. Governor Harris recommended nearly $2 million in state-level funding of

the Act in his proposed executive budget for the 1986 legislative session, but this was deleted by the General Assembly in its General Appropriations Act.[2]

Respondents, invoking the jurisdiction of the United States District Court for the Northern District of Georgia under 28 U.S.C. § 1343, filed a 42 U.S.C. § 1983 "class action" on October 24, 1986:

> on behalf of all present and future indigent persons charged with criminal offenses in the courts of Georgia and on behalf of all attorneys who represent indigent defendants in these courts.

Alleging a "State-wide systemic failure" to provide constitutionally "adequate" criminal defense services for indigents, respondents described their case as follows:

> The State of Georgia is required by the United States Constitution to provide indigent criminal defendants with criminal defense services. The services provided must be adequate to assure that the defendant has a fair opportunity to present a thorough and rigorous defense. Services provided in Georgia do not satisfy these minimum constitutional obligations.

While respondents' complaint expressly declared the constitutional obligation in question to be an obligation *of*

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[2] This scenario of the General Assembly's deletion of state funding for indigent criminal defense services recommended by Governor Harris was repeated during the 1987 and 1988 legislative sessions. During the 1989 Session, the General Assembly finally did include an appropriation for the indigent Criminal Defense Counsel Act, but only in the sum of one million dollars. *See* Ga. Laws, 1989, pp. 1492, 1496.

the State of Georgia, saying that it was the "state" which failed to assume "*its*" duty, they didn't file their action against the State or against its General Assembly (which had deleted the funding of "the Georgia Indigent Defense Act" which respondents desired and Governor Harris had recommended). Respondents instead sued Governor Harris on the ground that he occupied "the highest executive office in the State" and was as a result "responsible for state government efforts." Equating Governor Harris with the State of Georgia, respondents explained their position in subsequent briefing, saying that "Governor Harris' duty is the state's duty."

Respondents additionally named two chief superior court judges as defendants both in their own behalf and as representatives of a class defined as "all judges in Georgia trial courts, whether titled superior, state, municipal, magistrate or other court, which appoint attorneys or arrange for indigent criminal defense under other systems."

On June 24, 1987, the district court granted petitioners' motion to dismiss on Eleventh Amendment grounds. Noting that nothing in the complaint suggested that either the Governor or the defendant chief superior court judges had personally engaged in any unconstitutional or wrongful conduct or activity, the district court concluded that these defendants were simply surrogates for the State itself, and that it was *the State of Georgia* against which any judicial decree would in fact issue and be enforced. The district court relied upon the Court's decision in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101-102 (1984), as authority for the proposition that a suit against state officials which is in

reality a suit against a State is barred by the Eleventh Amendment regardless of whether it seeks damages or injunctive relief.

This initial decision of the district court was promptly followed by respondents' motion for reconsideration on the ground that under *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment did not bar suits against state officials for *prospective injunctive relief* even if this relief impacted upon the state treasury, and additionally, that an expenditure of money was not the only equitable remedy available. The district court granted respondents' motion to reconsider and directed further briefing on: (1) precisely how federal law was being violated when indigent criminal defendants were in fact being provided with counsel, and (2) what specific non-monetary relief respondents were demanding, and, if expenditures of state funds were necessary, how such expenditures would be *ancillary* to the enforcement of federal law. Respondents replied by stressing that it was "effective" counsel which the Sixth Amendment required, and reiterated that in Georgia counsel often lacked resources for adequate investigation and the retention of experts needed to provide "effective" assistance of counsel. As to non-monetary relief, respondents suggested that there might initially be an injunctive decree ordering petitioners to comply with constitutional standards and adhere to judicially declared constitutional norms. As the "bottom line" of the injunctive relief sought, on the other hand, respondents again said that what they wanted was "a[n] injunction expressly requiring expenditure of money."

This additional briefing was followed by the district court's second order of dismissal. Entered on December 31, 1987, this second order held that even assuming that the Eleventh Amendment did not bar respondents' suit for prospective injunctive relief, it was, as a suit to prevent anticipated future Sixth Amendment *"effectiveness* of counsel" and *"adequacy* of defense services" violations, subject to dismissal for failure to state a claim upon which relief could be granted. The district court reasoned that under *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648 (1984), "effective assistance of counsel" questions could not be adjudicated on an abstract or inferential basis, but only upon the very specific facts and circumstances of a particular trial, further opining that in such a case, a criminal defendant would also have to show actual prejudice to his right to a fair trial to prevail.

On November 23, 1988, the United States Court of Appeals reversed the district court's dismissal of respondent's action. As to the Eleventh Amendment barrier, the Court of Appeals concluded that under *Ex parte Young*, 209 U.S. 123 (1908), respondents' suit for prospective injunctive relief could be maintained against Governor Harris and the chief superior court judges, and that any funds that the State of Georgia might be required to spend if respondents were successful on the merits would be a permissible "ancillary" consequence of Georgia's compliance with federal constitutional standards. As to the "failure to state a claim" basis of the district court's second order of dismissal, the Court of Appeals held that the Court's Sixth Amendment "effectiveness of counsel" analysis in *Strickland v. Washington*, 466 U.S. 668 (1984)

and in *United States v. Cronic*, 466 U.S. 648 (1984), had to do with standards of review for trials which had already occurred, where the critical question was whether or not a criminal accused had been prejudiced respecting his right to a "fair trial." The panel decision of the Court of Appeals, unlike the district court and contrary to the opinion of four members of that same Court of Appeals upon denial of *en banc* rehearing, held that these *Strickland* and *Cronic* standards were inapplicable in a civil action for prospective relief to prevent anticipated future constitutional violations. The panel decision concluded that there can be deficiencies which while not violative of "effectiveness" of counsel standards nonetheless might violate other enforceable Sixth Amendment rights.

A suggestion of rehearing *en banc* was timely filed by petitioners on December 13, 1988, and remained pending in the Court of Appeals for over one year. On December 29, 1989, rehearing *en banc* was denied with the unusual occurrence of a ten page dissent by Circuit Judge Edmondson in which Chief Judge Tjoflat and two other circuit judges joined. The dissent viewed the district court's dismissal of the case as having been the correct disposition, opining that the panel opinion misconstrued the Sixth Amendment and ignored important considerations of equity, comity and federalism which in and of themselves made dismissal of the action appropriate.

REASONS FOR GRANTING THE WRIT

1. **THIS CASE IS OF EXTRAORDINARY IMPORTANCE TO THE FEDERAL-STATE RELATIONSHIP. THE DECISION OF THE COURT OF APPEALS WOULD EFFECTIVELY TERMINATE A STATE'S ELEVENTH AMENDMENT PROTECTION AGAINST SUITS FOR PROSPECTIVE INJUNCTIVE RELIEF. SECONDLY, IT WOULD SANCTION SUBSTANTIAL FEDERAL DISTRICT COURT INTRUSIONS INTO STATE JUDICIAL PROCEEDINGS, SOMETHING THE COURT HAS USUALLY VIEWED AS INCOMPATIBLE WITH PROPER CONCERNS OF EQUITY, COMITY AND FEDERALISM.**

   (a) **The Court of Appeals' reduction of the most important protection states have under the Eleventh Amendment to a mere formality, to what would in reality be no more than a pleading trap for the unwary, directly contradicts the Court's repeated pronouncements on the meaning and scope of that Amendment.**

The Court has identified the purposes of the Eleventh Amendment as being to protect states both as to their fiscal and political integrity. *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 642 (1911). The paramount concern of the Amendment is inherently *prospective*. It is intended to protect states against the disruption and expense of having to defend suits seeking to interfere with or control their political processes — probably the most conspicuous example of which would be their taxing and spending decisions for

the myriad programs and functions of government, inclusive of a state's internal allocation of governmental authority and funding responsibility between itself and local government. *See, Hopkins v. Clemson Agricultural College, supra; Great Northern Insurance Co. v. Read,* 322 U.S. 47, 53-54 (1954); *In Re Ayres,* 123 U.S. 443, 505 (1887); *Blake v. Kline,* 612 F.2d 718, 725 (3d Cir. 1979), *cert. denied,* 447 U.S. 921 (1980). Thus, the broad immunity from suit which the Amendment confers is not merely to the lesser concern of a possible imposition of monetary liability. Nor does it depend upon the nature of the relief sought. As the language of the Amendment itself makes clear, it is a threshold *jurisdictional* matter, going to the very power of a district court to entertain an action, and where the Amendment applies, deciding that question in the negative. *E.g., Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 238-240 (1985); *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 98-101 (1984); *Cory v. White,* 457 U.S. 85, 90-91 (1982); *Edelman v. Jordan,* 415 U.S. 651, 665-677 (1974); *Hopkins v. Clemson Agricultural College of South Carolina,* 221 U.S. 636 (1911).

The present case goes to the core meaning of the Eleventh Amendment in both respects. Precipitated by the Georgia General Assembly's removal of state-level funding for indigent criminal defense services from its General Appropriations Act of 1986, the action has, from the filing of the initial complaint through all subsequent briefs on behalf of the respondents, proceeded on the view that it is *the State of Georgia* which is a constitutional violator because of its failure to provide state-level funding for indigent criminal defense services, with respondents urging that a federal decree "expressly requir-

ing expenditure of money" is appropriate. In addition to seeking state-level "funding," the respondents undisguisedly ask for a decree requiring the State of Georgia to restructure its internal allocation of governmental authority and power, forcing it to shift funding and supervisory responsibility for indigent criminal defense services from counties and cities to the state-level of government — the sort of restructuring this Court has been reluctant to engage in in the past. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 54 (1973). As a threshold matter, the Court of Appeals' decision consequently conflicts, quite directly, with those fundamental purposes which this Court has identified as the basis for the very existence of the Eleventh Amendment.

The Court of Appeals' conclusion that simply casting the suit as one against Governor Harris and two chief judges of State judicial circuits eliminated Georgia's protection under the Eleventh Amendment is also in conflict with this Court's decisions. It is self-evident that if the Amendment is but a pleading device which can be circumvented by the simple guise of casting the suit as one against State officials rather than against the State itself, it is devoid of any real meaning or significance. Not surprisingly, and indeed as a matter of absolute necessity, this Court has long and consistently held that where a suit is *in substance* a suit against a State it is barred by the Eleventh Amendment regardless of whether or not the *named* defendants are officials of that State rather than the State itself. *E.g., Governor of Georgia v. Madrazo*, 1 Pet. (26 U.S.) 110, 123 (1828); *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 642 (1911);

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101 (1984).

This case is somewhat unusual in that respondents have never so much as sought to disguise the fact that Governor Harris and the two chief circuit court judges named as class defendants were, as the district court concluded in its Order of June 25, 1987, "simply surrogates for the State itself" and that it would be the State of Georgia "against which the Court would truly issue and enforce any decree." In addition to repeatedly referring to *Georgia's* alleged dereliction of its constitutional duty, respondents have in so many words conceded that they sued Governor Harris (initially in his official capacity only) because he occupied "the highest executive office in the State" and was "responsible for State government efforts," with his duty being "the State's" duty.

We do not believe that anything that the Court said in, or anything that it has subsequently said about, *Ex parte Young*, 209 U.S. 123 (1908), in any way indicates an intent to overturn or curtail the core *prospective* Eleventh Amendment protections of a state's fiscal and political integrity as urged by respondents and agreed to by the decision below. To the contrary, the teachings of the Court indicate that *Ex parte Young* is to be viewed as a narrow exception, available only where the defendant public official has been *personally* engaged or involved in a course of action or conduct alleged to be in violation of the supreme authority of the United States, the most common example being where a state official is responsible for the enforcement or application of a state statute which is unconstitutional. *E.g.*, *Ex parte Young*, 209 U.S.

123, 159-160 (1908); *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 462 (1945); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 (1984). In such situations, it is permissible to award prospective injunctive relief against the official to conform *his future conduct* to the mandate of the United States Constitution even when doing so has an *ancillary* impact upon the State treasury. *Edelman v. Jordan*, 415 U.S. 651, 667-668 (1974); *Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 102 (1984).

Respondents have never so much as suggested in this case that the underlying constitutional default which they expressly attribute to *the State of Georgia* (*i.e.*, Georgia's failure to assume state-level funding and supervisory responsibilities relating to indigent criminal defense services) is in any way a course of action or conduct in which either Governor Harris or the defendant chief superior court judges have had a direct role. Quite to the contrary, the only involvement pointed to by respondents on the part of Governor Harris has been his recommendation to the General Assembly in his executive budget that it do precisely what respondents now ask the federal courts to do — to provide state-level funding for indigent criminal defense services. For three consecutive sessions, the Governor recommended funding only to have his proposal deleted by the General Assembly. Indeed, one of the motions to dismiss on behalf of Governor Harris in the trial court was based upon the absence of any Article III "case or controversy" since his efforts in the area were in support of rather than in conflict with respondents' ob-

jective of state-level funding for indigent criminal defense services.

The conclusion of the Court of Appeals that under *Ex parte Young* the general state constitutional obligation of the Governor to see "that the laws are faithfully executed" is enough to make Governor Harris an appropriate party against whom prospective relief could be granted seems particularly strained in a case where accomplishment of the state-level funding and governmental restructuring sought by respondents cannot be accomplished by the executive as opposed to legislative branch of government.[3] The two chief circuit court judges named as class-action defendants are, of course, even further removed than the Governor from any involvement in or conduct concerning the question of state-level funding and supervision of indigent criminal defense services.

The practical problem with the expansive view of *Ex parte Young* in the instant decision of the Court of Appeals for the Eleventh Circuit is that it completely ends any Eleventh Amendment protection of a state in suits seeking prospective injunctive relief based upon constitutionally predicated demands. All that will be necessary

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[3] The Court of Appeals also refers to certain "residual" powers of the Governor to commence or direct the Attorney General to commence criminal *prosecutions*. Suffice it to say that no power, residual or otherwise, is pointed to in connection with the defense of criminal actions. By way of contrast, the Ninth Circuit has expressly rejected such generalized "faithful execution of the laws" responsibilities as enough of an involvement to circumvent the Eleventh Amendment. *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946, 953 (9th Cir. 1983).

in the future will be to simply cast the suit as one against the Governor of the State based upon his general constitutional duty to see that the law is faithfully executed. We believe that this reduction of a substantial constitutional protection to a mere pleading formality, to something which is no more than a pleading trap for the unwary, directly contradicts the core meaning and purpose of the Eleventh Amendment as announced by the Court in an unbroken line of decisions stemming from the adoption of the Amendment to the present date, including, but nowise limited to the decisions cited above. Because of this conflict of the decision of the Court of Appeals with the cited decisions of the Supreme Court, but even more importantly because of the great significance it poses as harmful precedent for federal-state relations, we respectfully submit that the Eleventh Circuit's drastic departure in Eleventh Amendment jurisprudence is worthy of this Court's plenary review, consideration and reversal.

(b) The Court of Appeals' decision sanctions interference with State court judicial proceedings incompatible with fundamental concerns of equity, comity and federalism.

Whether defined in terms of "justiciability" or "abstention," there are some cases which federal district courts decline to hear on policy grounds even when possessed of general subject matter jurisdiction. A category of cases long recognized as being particularly inappropriate for federal courts to entertain is where the remedy sought, if granted, would result in a substantial *federal* intrusion into *state* court proceedings. Concerns of equity, comity and federalism traditionally weigh against federal inter-

vention in such circumstances. *See, e.g., Younger v. Harris*, 401 U.S. 37, 43-44 (1971); *O'Shea v. Littleton*, 414 U.S. 488, 499-501 (1974).

In the case at bar, respondents' complaint expressly prays for the United States district court to "monitor and assure the implementation . . . throughout the state in all indigent defense systems," of certain uniform standards which respondents want promulgated to adequately compensate defense attorneys for indigents and otherwise enhance criminal defense services, including but not limited to the speedy appointment of attorneys to represent indigents. As the dissent to the Court of Appeals' denial of *en banc* rehearing points out:

> If plaintiffs state a claim for injunctive relief here, federal habeas corpus need not exist. We could simply and broadly enjoin all state court judges to apply the Constitution as we dictate; monitor the state judges' performance; allow criminal defendants in the midst of state proceedings to come to federal court to seek enforcement of our injunction; and, if need be, hold state court judges in contempt for not doing as we say. When we embark on this new course, we must prepare to face this unpleasant question: If a state judge does not obey a district judge's injunction, are we willing to jail the state judge for contempt? Avoidance of this unseemingly conflict between state and federal judges is one reason for *O'Shea* and *Younger*.
>
> ***
>
> While the lower federal courts are protectors of constitutional rights, that power does not make us the general superintendents of state court

> systems. I think the panel decision in this case is wrong, and I regret that a whole court has had no chance to study the case fully.

In addition to being at odds with the Court's pronouncements about equity, comity and federalism in *Younger* and in *O'Shea*, the decision below is also in direct conflict with decisions of other circuits in factual settings which are seemingly indistinguishable from the present situation. In *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. Unit A 1981), the Fifth Circuit affirmed dismissal of a broad challenge to the administration of the criminal justice system in Galveston County, Texas. That case, not unlike the instant one, sought prospective relief against alleged continued constitutional violations of the rights of indigent criminal defendants by: (1) providing "ineffective" court-appointed counsel, (2) denying "speedy" trial, (3) imposing "excessive" bail, (4) "coercing" guilty pleas, and (5) refusing to docket and hear *pro se* motions. The Fifth Circuit affirmed the district court's dismissal of the case on the ground that under *Younger* and *O'Shea*, the granting of such equitable relief would require excessive federal interference in the operation of state criminal courts. In *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974), the district court similarly dismissed a complaint alleging that a public defender's office had systematically failed to meet minimum constitutional standards in representing indigent criminal defendants at trial and seeking to enjoin further representation of indigences unless minimum standards of constitutional "effectiveness" were met. Here too, the Fifth Circuit affirmed the district court's dismissal under the authority of *Younger* and *O'Shea*.

In *Wallace v. Kern*, 499 F.2d 1345 (2nd Cir. 1974), the Court of Appeals for the Second Circuit opined that not even its direct knowledge that funding, facilities and personnel in Kings County Court, New York, were chronically inadequate to furnish criminal defendants with a speedy trial would justify federal judicial intervention in state criminal proceedings on a class basis. The Second Circuit explained:

> This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the state courts. Rather, the federal courts must limit their inquiry to the specific facts regarding a complaining petitioner. Relief from unconstitutional delays in criminals trials is not available in wholesale lots. Whether an individual has been denied his right to a speedy trial must be determined ad hoc on a case-by-case basis.

Wallace v. Kern, 499 F.2d at 1351.

From a viewpoint of equity, comity and federalism, the present decision of the United States Court of Appeals for the Eleventh Circuit would require anticipatory federal intervention on a far more massive scale than that sought in any of the above reported decisions concerning "effectiveness" of counsel or other contended "inadequacies" in the furnishing of indigent criminal defense services. Considerations of equity, comity and federalism alone made the district court's dismissal of respondents' case appropriate.

2. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE COURT'S DECISIONS IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984) AND *UNITED STATES V. CRONIC*, 466 U.S. 648 (1984).

There doubtless are some Sixth Amendment violations which are of a *per se* nature and hence subject to judicial remedy without the necessity of careful analysis of the precise factual setting involved. Examples would be across-the-board situations where representation by counsel is wholly denied by state law or policy, or where it is significantly and uniformly interfered with as, again simply by way of example, where by virtue of state law, policy or practice, there is no access to a psychiatrist regardless of the nature of the case.

This sort of *per se* situation plainly is not involved in the case at bar. All of the indigent criminal defense services mentioned by appellants are now and long have been provided in Georgia. The question in this case is instead the relative or proportional one of whether these services are being provided with "enough" fiscal support for counsel to be "effective" and for the criminal defense services to be "adequate."

Since it is the level or degree of counsel "effectiveness" which is in question in this case, the decisions in *Strickland v. Washington*, 466 U.S. 668 (1984) and in *United States v. Cronic*, 466 U.S. 648 (1984), are controlling and make clear that judicial review under the Sixth Amendment cannot properly proceed on an across-the-board "checklist" approach to the "effectiveness" of attorney performance (or with respect to the providing of other criminal defense services). Under these decisions,

judicial determinations can only be made on a case-by-case basis in the context of a specific legal proceeding or trial, each of which invariably presents its own unique factual circumstances. *Cronic* expressly rejects any "inferential" approach as to these issues. *United States v. Cronic*, 466 U.S. 648, 652-653 (1984).

The reasoning of the Eleventh Circuit that the Sixth Amendment protects rights that do not affect the outcome of a trial, and that deficiencies which do not meet the "ineffectiveness" standard may nonetheless violate a defendant's Sixth Amendment rights, in addition to being unsupported by any cited authority, is in direct conflict with the observations of the Court in both *Strickland* and *Cronic* that the very purpose of the Sixth Amendment is to ensure that a defendant will have a "fair trial." Under *Strickland* and *Cronic*, "effectiveness" and "adequacy" claims are not abstractions and cannot be adjudicated apart from the particular circumstances of a particular case. Under *Strickland* and *Cronic*, there can also be no Sixth Amendment violation in the absence of a showing of prejudice. The decision below is in direct conflict with Sixth Amendment jurisprudence as announced by the Court in *Strickland* and *Cronic*, and for this reason, too, certiorari should be granted and the decision below reversed.

CONCLUSION

For all of the reasons stated, the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case should be granted and the decision below reversed by this Honorable Court.

Respectfully submitted,

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APPENDIX

Appendix A

OPINION OF THE COURT OF APPEALS

HORACE LUCKEY, IIII, et al.,
Plaintiffs-Appellants,

v.

JOE FRANK HARRIS, Governor, et al.,
Defendants-Appellees.

No. 88-8047.

United States Court of Appeals,
Eleventh Circuit.

Nov. 23, 1988.

Appeal from the United States District Court for the Northern District of Georgia.

Before VANCE and HATCHET, Circuit Judges, and SCOTT*, District Judge.

VANCE, Circuit Judge:

This is an appeal from dismissal of a complaint on two alternate grounds: that the eleventh amendment bars relief against the defendants and that the complaint fails to state a claim for which relief could be granted. Appellants, on behalf of a bilateral class consisting of all indigent persons presently charged or who will be charged in

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* Honorable Thomas E. Scott, U.S. District Judge for the Southern District Florida, sitting by designation.

the future with criminal offenses in the courts of Georgia and of all attorneys who represent or will represent indigent defendants in the Georgia courts, brought this action under 42 U.S.C. § 1983 (1982) against the following defendants in their official capacities: Joe Frank Harris, the Governor of Georgia, the Honorable Robert J. Noland, Chief Judge of the Douglas Judicial Circuit, the Honorable Joe E. Crumbley, Chief Judge of the Clayton Judicial Circuit, and all Georgia judges responsible for providing assistance of counsel to indigences criminally accused in the Georgia courts. Appellants allege that systemic deficiencies including inadequate resources, delays in the appointment of counsel, pressure on attorneys to hurry their clients' case to trial or to enter a guilty plea, and inadequate supervision in the Georgia indigent criminal defense system deny indigent criminal defendants their sixth amendment right to counsel, their due process rights under the fourteenth amendment, their right to bail under the eighth and fourteenth amendments and equal protection of the laws guaranteed by the fourteenth amendment. Appellants seek an order requiring that appellees meet minimum constitutional standards in the provision of indigent criminal defense services.

On June 24, 1987, the district court granted defendants' motion to dismiss on the grounds that the suit, while nominally against the Governor and state court judges, was in essence a suit against the state of Georgia and therefore was barred by the eleventh amendment. Appellants filed a motion for reconsideration. On December 31, 1987 the court once again granted appellees' motion to dismiss, concluding that even if the eleventh amendment were no bar to appellants' action, the suit

failed to state a claim for which relief could be granted. For the reasons stated below, we reverse on both grounds and remand for further proceedings consistent with this opinion.

I.

The threshold issue is whether appellants' suit is barred by the eleventh amendment. The eleventh amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although this amendment does not expressly prohibit suits against a state by its own citizens, it has long been interpreted to bar such suits. *See Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Both parties agree that this suit involves the scope of the exception to the eleventh amendment first stated in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 44, 52 L.Ed. 714 (1908). This case involved a suit against a state attorney general to enjoin him from applying against plaintiffs a state law alleged to be unconstitutional. The Supreme Court held that a suit against an officer of a state directing him to refrain from unconstitutional conduct is not a suit against a state within the meaning of the eleventh amendment *Id.* at 156, 28 S.Ct. at 452. This exception has been developed over the years to permit prospective relief against state officers in their official capacities to refrain

from unconstitutional conduct even though compliance may cost the state money. *See, e.g., Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977).

The district court held that appellants' suit fell outside the scope of the *Young* exception. The court relied on two factors to determine that the officials named in this suit were simply surrogates for the state itself: any decree or order would be enforced against the state and the complaint did not allege that "any defendant, as an individual, has personally undertaken any unconstitutional or wrongful action." The court concluded that the state was the real party in interest and the suit was barred by the eleventh amendment. We address each of these factors separately.

A.

[1] Appellees assert this suit is in essence against the state of Georgia because its real goal is to obtain increased funding for indigent services and because the state will ultimately bear the cost of any relief ordered against the named defendants. In their complaint appellants seek an order compelling appellees to meet minimum constitutional standards in the provision of indigent defense services. Specifically, they asked the court to order that appellees provide attorneys at probable cause determinations if so requested by indigent defendants, for speedy appointment of counsel at all critical stages in the criminal process, for adequate investigative services and experts, for the adequate compensation of attorneys representing indigences, and for uniform standards governing the representation of indigences to be adopted and main-

tained. If this relief were granted, it would doubtless result in expense to the state of Georgia.

Cases defining the scope of the *Ex parte Young* exception, however, have focused not on the source or amount of funds required to be expended if relief were granted, but on whether the funds are required to be expended as compensation for *past* wrongdoing by the state or as an "ancillary effect" of compliance with the court order. As the Supreme Court explained in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974),

> [S]tate officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young* . . .

Id. at 668, 94 S.Ct. at 1358. *See also Milliken v. Bradley*, 433 U.S. at 289, 97 S.Ct. at 2461 (eleventh amendment no bar to court order that state defendants pay one-half costs attributable to education components in school desegregation plan; the *Young* exception "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury").

Admittedly, "the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between day and night." *Edelman*, 415 U.S. at 667, 94 S.Ct. at 1357. The touchstone, however, is whether an expendi-

ture is a "necessary result of compliance with decrees which by their terms [are] prospective in nature," *id.* at 668, 94 S.Ct. at 1358, or a goal in itself. *Edelman* demonstrates this distinction. The Supreme Court reversed an order requiring the retroactive payment of benefits found to be wrongfully withheld by Illinois officials from applicants for state-administered aid to the aged, blind and disabled. On appeal the state "concede[d] that *Ex Parte Young* . . . is no bar to that part of the District Court's judgment that prospectively enjoined petitioner's predecessors from failing to process applications within the time limits established by the federal regulations." *Id.* at 664, 94 S.Ct. at 1356. The Court concluded, however, that the eleventh amendment did bar the order requiring retroactive payment of benefits because

> [i]t requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioner was under no court-imposed obligation to conform to a different standard.

Id. at 668, 94 S.Ct. at 1358.

Likewise, in *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), the Court held that while the eleventh amendment did not bar an equal protection clause challenge to the unequal distribution of funds from lands set aside to support local schools, it did bar attempts to require state officials to pay to some local school boards yearly income based on amounts that had been generated by lands set aside to fund local education before

the lands were sold by state officials. While the Court recognized that these claims could be similar, it noted that the determining factor is the theory of the relief sought.

> It may be that the current disparity results directly from the same actions in the past that are the subject of the petitioners' trust claims, but the essence of the equal protection allegation is the present disparity in the distribution of the benefits of state-held assets and not the past actions of the State. A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure " 'compliance *in the future* with a substantive federal-question determination' " rather than bestow an award for accrued monetary liability. *Milliken v. Bradley*, 433 U.S. at 289, 97 S.Ct. at 2762 (quoting *Edelman*, 415 U.S. at 664, 94 S.Ct. at 1356).

Papasan v. Allain, 478 U.S. at 282, 106 S.Ct. at 2942 (emphasis in original).

When this test is applied to the relief appellants seek, it is clear that the eleventh amendment does not bar their suit. Appellants seek an order to compel appellees to provide indigent defense services that meet minimum constitutional standards. While the state ultimately may finance compliance with such an order, this fact is not determinative. Any funds that the state of Georgia may be required to spend if appellants were successful on the merits would be an ancillary effect of future compliance with constitutional standards. Accordingly, we hold that the relief appellants seek falls within the *Ex parte Young* exception to the eleventh amendment's general prohibition of suits brought against a state by its own citizens.

B.

[2] We turn now to two related claims concerning the naming of state officials as defendants in this action. Appellees assert that the *Ex parte Young* exception requires that the defendants must have taken some action personally that violates the Constitution.

Personal action by defendants individually is not a necessary condition of injunctive relief against state officers in their official capacity. All that is required is that the official be responsible for the challenged action. As the *Young* court held, it is sufficient that the state officer sued must, "by virtue of his office, ha[ve] some connection" with the unconstitutional act or conduct complained of. "[W]hether [this connection] arises out of general law, or is specially created by the act itself, is not material so long as it exists." *Young*, 209 U.S. at 157, 28 S.Ct. at 453. According to the Georgia constitution, the governor is responsible for law enforcement in that state and is charged with executing the laws faithfully. Ga. Const. Art. 5, § 2, ¶ 2. The governor further has the residual power to commence criminal prosecutions, Ga. Code Ann. § 17-1-2 (1982), and has the final authority to direct the Attorney General to "institute and prosecute" on behalf of the state. *Id.* § 45-15-35. Judges are responsible for administering the system of representation for the indigent criminally accused. *Id.* §§ 17-124 to -10, 17-12-60. Defendants are therefore appropriate parties against whom prospective relief could be ordered. *See Papasan v. Allain*, 487 U.S. at 282 n. 14, 106 S.Ct. at 2943 n. 14 (Secretary of state responsible for "general supervision" of administration by local school officials of lands set aside for educational purposes prop-

erly could be enjoined under *Young* exception in suit alleging violation of equal protection in distribution of funds from land). *See also Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965) (Georgia Secretary of State sued in apportionment case); *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (Alabama Secretary of State sued in apportionment case).

[3] Appellees further contend that the dismissal should be upheld because there is no "case or controversy" between the parties in this suit. This claim is largely foreclosed by our analysis above. In any event, we conclude that appellants' allegations that they are presently being denied constitutional rights as a direct result of the failure of appellees to furnish counsel in a manner that meets minimum constitutional standards is sufficient to satisfy the Article III requirement of an allegation that they have sustained or are immediately in danger of sustaining some "real and immediate injury" resulting from challenged official conduct. *See United Pub. Workers of America v. Mitchell*, 330 U.S. 75, 88-91, 67 S.Ct. 556, 563-65, 91 L.Ed. 754 (1947).

II.

[4] We next address whether the suit was properly dismissed for failure to state a claim for which relief can be granted under Fed.R.Civ.P. 12(b)(6). On such a motion the complaint should not be dismissed unless it appears "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim that would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *accord Bradberry v. Pinellas County*, 789 F.2d 1513, 1515 (11th Cir.1986). Even taking

the allegations of the complaint as true, the district court concluded that appellants had failed to state a claim upon which relief could be granted.

> The problem with plaintiffs' claim is that they seek an across-the-board ruling that the Georgia criminal defense scheme systematically denies or *will deny in the future* effective assistance of counsel to the indigent accused. . . . The Supreme Court, however, has explained that an evaluation of effective assistance is inextricably bound up with the particular facts of a case. Few are the circumstances that a court can declare so compromising that ineffective assistance is essentially inevitable.

(emphasis in original). The district court's ruling clearly indicated that appellants had to prove "an across-the-board future inevitability of ineffective assistance." Taking the facts of the complaint as true, the court concluded that appellants' allegations were insufficient to meet the "ineffective assistance of counsel" standard as set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) and dismissed appellants' complaint.[1]

We cannot agree that appellants' burden in this action for injunctive relief was to establish that ineffective

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[1] The district court did not address whether appellants' eighth amendment and equal protection claims failed to state a claim on which relief could be granted. Accordingly, we confine our analysis to appellants' sixth amendment claims.

assistance was inevitable for each of the class members. Accordingly, we reverse.

Strickland v. Washington established the test for determining when counsel has rendered ineffective assistance. This test requires that the prisoner show: (1) that the performance of his counsel was deficient, i.e., that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) that the deficient performance by his counsel prejudiced his defense, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687, 104 S.Ct. at 2064.

This standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively. *See, e.g, Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (Alabama preliminary hearing in which determination is made if there is sufficient evidence to warrant presenting a case to grand jury is "critical stage" in the state's criminal process at which the accused is entitled to assistance of counsel; remand to determine

whether denial of counsel prejudiced defense so as to require new trial); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (post-indictment line-up for purpose of identification is "critical stage" in criminal process at which accused is entitled to assistance of counsel; remand to determine if the introduction of evidence from hearing was harmless error requiring no new trial); *Pugh v. Rainwater*, 483 F.2d 778, 787 (5th Cir.1973) ("The distinction between a pre-trial declaration of a right to a hearing and a post-conviction appeal for reversal on the basis of the absence of such hearing is a pragmatic and sensible distinction.") *aff'd in part, rev'd in part on other grounds sub nom. Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only where that defendant has been prejudiced. The *Strickland* court noted the following factors in favor of deferential scrutiny of a counsel's performance in the post-trial context: concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel. 466 U.S. at 690. These considerations do not apply when only prospective relief is sought.

Prospective relief is designed to avoid future harm. *Swift & Co. v. United States*, 276 U.S. 311, 326, 48 S.Ct. 311, 315, 72 L.Ed. 587 (1928). Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial. For example, in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Supreme Court considered the claims of a class of accused

individuals detained in Florida jails without a determination of probable cause. The detainees had been granted declaratory and injunctive relief in the court below. On appeal, the Supreme Court affirmed that part of the Court of Appeal's decision declaring that the Florida procedure violated defendant's rights under the fourth amendment because it did not require a timely judicial determination of probable cause as a condition of detention pending trial. *Id.* at 126, 95 S.Ct. at 869. Yet the Court expressly noted that a showing of illegal arrest or detention is not automatic grounds for overturning a subsequent conviction. *Id.* at 119, 95 S.Ct. at 865.

In a suit for prospective relief the plaintiff's burden is to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." *O'Shea v. Littleton*, 414 U.S. 488, 502, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974); *see also, United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). This is the standard to which appellants, as a class, should have been held.

Appellants have alleged that systemic delays in the appointment of counsel denies them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hampers the ability of their counsel to defend them, and effectively denies them their eighth and fourteenth amendment right to bail, that their attorneys are denied investigative and expert resources necessary to defend them effectively, that their attorneys are pressured by courts to hurry their case to trial or to enter a guilty plea, and that they are denied equal protection of the laws. Without passing on the merits of these allegations, we conclude that they are sufficient to state a claim

upon which relief could be granted. *See Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961). Accordingly, we REVERSE the order of the district court and REMAND for further proceedings consistent with this opinion.

Appendix B

JUNE 24, 1987 DISMISSAL ORDER OF DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BEVERLY CANNON,
HORACE LUCKEY, III,
M.V. BOOKER,
WILLIAM F. BRAZIEL, JR.,
JOSEPH SAIA and CHARLES
THORNTON, on Their Behalf
and on Behalf of All Persons
Similarly Situated,

Plaintiffs,

CIVIL ACTION

v.

NUMBER C86-297R

JOE FRANK HARRIS, Governor;
and HON. ROBERT J. NOLAND,
Chief Judge of Douglas Judicial
Circuit; and HON. JOE E.
CRUMBLEY, Chief Judge of Clayton
Judicial Circuit; on Their Own
Behalf and on Behalf of Others
Similarly Situated,

Defendants.

ORDER

This case is before the Court on defendants' motion to dismiss. For the reasons set forth below the motion will be granted.

Plaintiffs filed the complaint in this case on October 24, 1986, and an amended complaint was filed by the plaintiffs on November 25, 1986, pursuant to Fed. R. Civ. P. 15(a). The action is brought as a class action on behalf of two groups of plaintiffs; all present and future indigent persons charged with criminal offenses in the courts of Georgia, and all attorneys who represent indigent defendants in those courts.

The complaint alleges a statewide systemic failure to provide constitutionally adequate criminal defense services for indigents. Jurisdiction is premised under 28 U.S.C. § 1343 for violations of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Specifically, plaintiffs contend that the lack of adequate funding for the State's indigent criminal defense system denies indigent defendants their Constitutional right to counsel; that systemic and funding deficiencies in the indigent defense scheme denies plaintiffs due process; that delays in appointment of counsel denies plaintiffs the right to bail; that the disparity of resources in various jurisdictions denies indigent defendants equal protection; and, that the overall failure of the Georgia criminal defense system to provide adequate defense denies equal protection to indigent criminal defendants.

The defendants are, respectively, the Governor of the State of Georgia, and all Georgia State Court Judges who

appoint attorneys or otherwise arrange for the defense of indigent criminal defendants.

BACKGROUND

The State of Georgia has passed an Indigent Defense Act, O.C.G.A. § 17-12-30, *et seq.*, which states that it is the policy of the State to:

> provide the constitutional guarantees of the right to counsel and equal access to the courts to all its citizens in criminal cases and to provide: (1) Adequate defense services for indigent persons accused of crime; (2) Adequate compensation for counsel who represent indigent persons accused of crime.

The Act also provides for the authority of the local courts to appoint counsel and to order compensation from county funds. The State of Georgia, while having passed this meritorious Act, has not appropriated any funds for criminal indigent services. Almost $2 million was recommended for such services by the Governor, but the proposed amount was deleted by the Georgia General Assembly in its 1986 session.

The State also has provided by statute for the representation of indigences through the acts of local courts. O.C.G.A. § 17-12-1, *et seq*. These and other provisions of state law are designed to guarantee the "fundamental and essential" right of one charged with crime to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), but plaintiffs allege that they fail to do their job. Indeed, this may be so. However, before this Court can hear this claim and

determine its merits, it must first determine whether it has jurisdiction over the parties.

ELEVENTH AMENDMENT

Defendants have moved to dismiss on several grounds. Because this Court finds the motion to dismiss under Fed. R. Civ. P. 12(b) to be dispositive, it will not consider the other motions.

Defendants have moved to dismiss the complaint on the grounds that the action against the Governor and the State Court Judges is actually a suit against the State of Georgia which is barred by the Eleventh Amendment. The Court agrees. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States of Citizens of another State or by Citizens or Subjects of any Foreign State.

Although the amendment does not expressly prohibit suits against a state by its own citizens, the Supreme Court has construed to act as a bar in such cases. *Edelman v. Jordan*, 415 U.S. 651 (1974). To determine what effect the amendment will have on a suit before it, a court must decide whether the state is the real party in interest. The court will look at the "essential nature and effect of the proceeding" in making such a determination. *Ford Motor Company v. Treasury of State of Indiana*, 323 U.S. 459 (1945). In suits against state officers, the state can be the real party in interest. Even when an action purports to be against an officer as an individual, "if the court finds that the officer is being sued as a representative of state action"

the suit will be barred by the Eleventh Amendment. Wright, Miller & Cooper, *Federal Practice and Procedure, Jurisdiction 2d* § 3524.

An exception to the Eleventh Amendment was first articulated in *Ex parte Young*, 209 U.S. 123 (1908). In *Young* the Supreme Court held that the Eleventh Amendment did not bar an action against a state officer to restrain unconstitutional conduct on his part under color of state law. The Court reasoned that a state cannot authorize its officers to act unconstitutionally. If an officer acts unconstitutionally he is stripped of any representative character and any constitutional immunity. Plaintiffs seek to employ the legal fiction of *Young* to preserve their action here, but it does not suffice.

Nothing in the complaint states that any defendant, as an individual, has personally undertaken any unconstitutional or wrongful action. Indeed, the complaint against the Governor asserts that he is being sued in his "official capacity." The Governor and the Judges are simply surrogates for the State itself. The Eleventh Amendment bars a suit against these state officials where

> "the state is the real substantial party in interest . . . the general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter . . . a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief."

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 101-02 (1984). This case is, in fact, a suit against the State. It is the State against which the Court would truly

issue and enforce any decree. It is not the individual actions of any of the named defendants that is at issue.

Plaintiffs assert that because their requested relief is forward looking, and of constitutional magnitude, the Eleventh Amendment should not act as a bar. As has been noted elsewhere, a violation of constitutional rights does not, by itself, defeat the Eleventh Amendment. *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 559 (5th Cir. 1982) (citing *Quern v. Jordan*, 440 U.S. 332, 338-45, noting that the Civil Rights Act does not abrogate Eleventh Amendment immunity). While the Eleventh Amendment does not bar prospective relief in cases that fall under *Young*, this case does not fall within that exception.

Nor is there a bar to the application of the Eleventh Amendment in this case by application of the holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Plaintiffs urge that the State Court judges be considered local government officials, and thus not protected by the State's immunity. But *Monell* is inapposite in this instance. The relief sought, and the true aim of this lawsuit, is against the State of Georgia, to force it to shoulder its constitutional responsibilities. It is not brought to prevent some unconstitutional acts by these Judges or by the Governor. It is, as stated in the complaint, the "systemic failure" of the indigent defense scheme that plaintiffs seek to attack. The officials here are not sued in their individual capacity, but as substitutes for the State itself. Having determined that this suit constitutes an action against the State, the State's invocation of Eleventh Amendment immunity is a bar to federal jurisdiction.

Alabama v. Pugh, 438 U.S. 781 (1978); *Edelman v. Jordan*, 415 U.S. 651 (1974). The State has not consented to jurisdiction or waived its immunity. Nor has there been Congressional abrogation of that immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

ACCORDINGLY, defendants' motion to dismiss under rule 12(b)(2) is GRANTED and the case DISMI§ED.

IT IS SO ORDERED, this the 24th day of June, 1987.

/s/ Harold S. Murphy

UNITED STATES DISTRICT JUDGE

Appendix C

JUNE 25, 1987 JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

BEVERLY CANNON, HORACE LUCKEY, III, M. V. BOOKER, WILLIAM F. BRAZIER, JR., JOSEPH SAIA and CHARLES THORNTON, on Their Behalf and on Behalf of All Persons Similarly Situated

JUDGMENT IN A CIVIL CASE

v.

Case Number: C86-297R

JOE FRANK HARRIS, Governor; and HON. ROBERT J. NOLAND, Chief Judge of Douglas Judicial Circuit; and HON. JOE E. CRUMBLEY, Chief Judge of Clayton Judicial Circuit; on Their Own Behalf and on Behalf of Others Similarly Situated

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came on for consideration before the court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Finding for the Defendants and against the plaintiffs, that the Defendants, JOE FRANK HARRIS, Governor; and HON. ROBERT J. NOLAND, Chief Judge of Douglas Judicial Circuit; and HON. JOE E. CRUMBLEY, Chief Judge of Clayton Judicial Circuit; on Their Own Behalf and on Behalf of Others Similarly Situated, recover of the Plaintiffs, BEVERLY CANNON, HORACE LUCKEY, III, M. V. BOOKER, WILLIAM F. BRAZIER, JR., JOSEPH SAIA and CHARLES THORNTON, on Their Behalf and on Behalf of All Persons Similarly Situated their costs of this action.

June 24, 1987
Date

LUTHER D. THOMAS
Clerk

/s/ Doris Davis
(By) Deputy Clerk

Appendix D

SEPTEMBER 30, 1987 ORDER OF DISTRICT COURT GRANTING RECONSIDERATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BEVERLY CANNON,
HORACE LUCKEY, III,
M.V. BOOKER,
WILLIAM F. BRAZIEL, JR.,
JOSEPH SAIA and CHARLES
THORNTON, on Their Behalf
and on Behalf of All Persons
Similarly Situated,

Plaintiffs,

v. CIVIL ACTION

NUMBER C86-297R

JOE FRANK HARRIS, Governor;
and HON. ROBERT J. NOLAND,
Chief Judge of Douglas Judicial
Circuit; and HON. JOE E.
CRUMBLEY, Chief Judge of Clayton
Judicial Circuit; on Their Own
Behalf and on Behalf of Others
Similarly Situated,

Defendants.

ORDER

Presently before the Court is plaintiffs' motion for reconsideration of the Court's June 24, 1987, Order which granted defendants' motion to dismiss.

Plaintiffs argue that the Eleventh Amendment does not bar suits for prospective injunctive relief against state officials who are acting in violation of federal law. The Court in principle agrees.

The Eleventh Amendment prohibits lawsuits against the state by private parties. To circumvent this prohibition when federal rights are violated, courts have resorted to the "legal fiction" of allowing injunctive suits against state officials rather than the state itself. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Under *Ex parte Young*, state officials can be sued in their official capacities for prospective relief under certain circumstances. *United States v. State of Alabama*, 791 F.2d 1450, 1457 (11th Cir. 1986). Furthermore, that compliance with a decree enforcing federal law will have an ancillary effect on the state treasury is the inevitable and permissible consequence of *Ex parte Young*-type suits. *Edelman v. Jordan*, 415 U.S. 651, 667-68, 94 S.Ct. 1347, 1357-58, 39 L.Ed.2d 662 (1974). *See Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977) (approving court order against state officials to disburse state funds for instituting educational program in desegregation suit).

In their motion to reconsider, plaintiffs have stated that compelling state defendants to expend money for the criminal defense of indigences is not the only relief possible. Plaintiffs contend that other forms of remedies may

be fashioned; however, plaintiffs fail to indicate what that alternative relief would be.

The Court therefore directs the plaintiffs to address the following issues:

> (1) In regards to plaintiffs' claim that the state is not providing effective assistance of counsel because of its inadequate funding for indigent criminal defense, whether federal law is being violated by the state or its officials when the state is providing indigent defendants with counsel; and
>
> (2) What specific relief are plaintiffs demanding as a remedy for the alleged violations of federal law, and if expenditures of state funds are necessary, how such expenditures are *ancillary* to the enforcement of federal law.

ACCORDINGLY, plaintiffs' motion for reconsideration is GRANTED. Plaintiffs shall have 15 days from the date of this Order in which to file an appropriate brief. Defendants may then have 10 days in which to file their response. The Clerk is directed to resubmit defendants' motion to dismiss on October 30, 1987.

IT IS SO ORDERED, this the 30th day of September, 1987.

/s/ Harold S. Murphy
UNITED STATES DISTRICT JUDGE

Appendix E

DECEMBER 31, 1987 DISMISSAL ORDER OF DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

BEVERLY CANNON,
HORACE LUCKEY, III,
M.V. BOOKER,
WILLIAM F. BRAZIEL, JR.,
JOSEPH SAIA and CHARLES
THORNTON, on Their Behalf
and on Behalf of All Persons
Similarly Situated,
Plaintiffs,

v. CIVIL ACTION

NUMBER C86-297R

JOE FRANK HARRIS, Governor;
and HON. ROBERT J. NOLAND,
Chief Judge of Douglas Judicial
Circuit; and HON. JOE E.
CRUMBLEY, Chief Judge of Clayton
Judicial Circuit; on Their Own
Behalf and on Behalf of Others
Similarly Situated,

Defendants.

ORDER

This case is before the Court on the briefs of the parties in response to the Court's grant of reconsideration of its dismissal of this case on Eleventh Amendment grounds. After considering the materials submitted, the Court holds that even assuming that the Eleventh Amendment is no bar to maintenance of this action, the action must be dismissed for failure to state a claim for which relief can be granted.

On a motion to dismiss for failure to state a claim, Fed.R.Civ.P. 12(b)(6), the court must take as true the factual allegations of the complaint. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). Moreover, the Court should not dismiss the complaint unless it appears "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see Bradbury v. Pinellas Courty*, 789 F.2d 1513, 1515 (11th Cir. 1986).

The complaint alleges a statewide systemic failure to provide constitutionally adequate criminal defense services for indigents. Specifically, plaintiffs contend that the lack of adequate funding for the State's indigent criminal defense system denies indigent defendants their constitutional right to counsel, that systemic and funding deficiencies in the indigent defense scheme deny plaintiffs due process, that delays in appointment of counsel deny plaintiffs the right to counsel and to bail, that the disparity of resources in various jurisdictions denies indigent defendants equal protection, and that the overall failure of the Georgia criminal defense system to provide adequate

defense denies equal protection to indigent criminal defendants.

This court is sensitive to the unfortunate conditions of indigency in Georgia and of indigent defendants in particular. A recent series of articles in *The Atlanta Journal* and *The Atlanta Constitution*, for example, reveals many apparent disparities among the poor and the better-off in the Georgia state criminal justice system. The Court considers laudable the efforts of the plaintiffs and their counsel to improve this system. The Court, however, is convinced that based on the allegations of the complaint, it cannot grant the relief requested.

The Sixth Amendment to the United States Constitution is applicable to the States through the Fourteenth Amendment and mandates that the State of Georgia provide counsel to all indigent criminal defendants. *See Gideon v. Waintwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Moreover, all such defendants have the right to "effective assistance of counsel." *See, e.g., Strickland v. Washington*, 466 U.S. 668, 686 (1984); *United States v. Cronic*, 466 U.S. 648 (1983). If an indigent criminal defendant is deprived of this right to effective assistance of counsel and demonstrates this to a federal court, his conviction will be overturned.

In *Washington*, the Supreme Court set out the standard for judging whether counsel's performance in a particular case constituted the provision of effective assistance. While plaintiffs contend that *Washington* is inapplicable because they seek prospective relief only, the case is nevertheless instructive in this instance. There the Court explained that

> the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Washington, 466 U.S. at 689. The Court noted that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693.

The Court held that to prove actual ineffective assistance, a petitioner must demonstrate first that counsel's performance was deficient, that is, that it was outside the wide range of competence demanded of attorneys in criminal cases, that it fell below "an objective standard of reasonableness." Id. at 687-88. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Second, the deficiencies in counsel's performance must have been prejudicial to the defense in order to constitute ineffective assistance under the Constitution. *Id.* at 692.

Plaintiffs contend that the Supreme Court's standard set out in *Washington* is inapplicable because it was fashioned for a retrospective look at counsel's performance. They assert that they do not seek a reversal of any conviction, rather they assert that "the Court should take a prospective look, find that the Georgia approach inherently leads to ineffective assistance, and require a system designed to supply minimally adequate counsel." Plain-

tiff's Response to Defendants' Motions to Dismiss at 11. They contend that "they will demonstrate the certainty that an unacceptable number of present and future indigent accused will receive inadequate representation as a result of the Georgia non-system." *Id.* at 14.

The plaintiffs contend that the current system prevents counsel from rendering effective assistance. The Supreme Court "has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. *E.g., United States v. Cronic* . . . ." *Washington*, 466 U.S. at 683.

In *United States v. Cronic*, 466 U.S. 468 (1983), the Court explained that certain situations involving the Sixth Amendment right to counsel are of such magnitude as to constitute a *per se* denial of the right to counsel, for example, a complete denial of counsel or a refusal to allow counsel to withdraw when a conflict of interest has appeared. *Id.* at 658-662, *and see cases cited therein.*

> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Id. at 659-60.

The problem with plaintiffs' claim is that they seek an across-the-board ruling that the Georgia criminal defense scheme systematically denies or *will deny in the future* effective assistance of counsel to the indigent accused. The claim focuses on the insufficient monetary resources available to the defense and the delays in appointment. The Supreme Court, however, has explained that an evaluation of effective assistance is inextricably bound up with the particular facts of a case. Few are the circumstances that a court can declare so compromising that ineffective assistance is essentially inevitable.

In *Cronic*, the Court held that the following five factors, while relevant in evaluating a lawyer's effectiveness in an particular case, were insufficient, either alone or in combination, to provide a basis for concluding that competent counsel was unable to provide the defendant with effective assistance: (1) appointed counsel was young and inexperienced, (2) counsel was given only 25 days to prepare for a trial when the government had taken four years to investigate the case, (3) the gravity of the charge, (4) the complexity of possible defenses, and (5) the accessibility of witnesses. *Id.* at 652, 663-67. None of these circumstances *in themselves* make it unlikely that the defendant received the effective assistance of counsel. *Id.* at 666.

Compare *Powell v. Alabama*, 287 U.S. 45 (1932), where the Supreme Court presumed ineffectiveness from the surrounding circumstances, including appointment on the day of trial, with *Avery v. Alabama*, 308 U.S. 444 (1940), where the Court held that the circumstances did not make it unreasonable to expect that counsel could ad-

equately prepare for trial although counsel was appointed only three days before trial in a capital case.

This Court cannot rule that a delay of a certain number of days or the State's failure to provide a certain number of dollars for defense expenses constitutes an across-the-board future inevitability of ineffective assistance under any set of facts alleged or implied in the plaintiffs' complaint. The Court thus holds that the complaint fails to state a claim for relief, aid the complaint will be dismissed.

ACCORDINGLY, the Defendants' Motion to Dismiss is GRANTED, and this case is DISMISSED.

IT IS SO ORDERED, this the 31st day of December, 1987.

/s/ Harold S. Murphy
UNITED STATES DISTRICT JUDGE

Appendix F

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-8047

D.C. Docket No. 4:86-297

HORACE LUCKEY, III, et al.,

Plaintiffs-Appellants,

versus

JOE FRANK HARRIS, Governor, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before VANCE and HATCHETT, Circuit Judges, and SCOTT*, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

---

* Honorable Thomas E. Scott, U. S. District Judge for the Southern District of Florida, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the order of the District Court appealed from, in this cause be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 23, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: JAN. 18, 1990

Appendix G

ORDER OF THE COURT OF APPEALS DENYING REHEARING EN BANC WITH DISSENTING OPINION

Horace LUCKEY, III, et al.,
Plaintiffs-Appellants,

v.

Joe Frank HARRIS, Governor, et al.,
Defendants-Appellees.

No. 88-8047.

United States Court of Appeals,
Eleventh Circuit.

Dec. 29, 1989.

Appeal from the United States District Court for the Northern District of Georgia; Harold L. Murphy, Judge.

ON PETITIONS FOR REHEARING
AND SUGGESTIONS OF
REHEARING IN BANC

(Opinion November 23, 1988, 11 Cir., 1988, 860 F.2d 1012).

Before VANCE* and HATCHETT, Circuit Judges, and SCOTT**, District Judge.

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* Judge Vance participated in the poll of the court.

** Hon. Thomas E. Scott, U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

EDMONDSON, Circuit Judge, dissenting in which TJOFLAT, Chief Judge, FAY and COX, Circuit Judges, join:,

Concerns of equity, comity and federalism make this an exceptionally important case. Today's court unfortunately has declined to give the case that extra consideration which comes with in banc rehearing. On our court, dissents are rarely written when we decline in banc rehearing; but the principles involved here require me to protest and to explain briefly the way I see the case.

The district judge dismissed this case, believing that he lacked the authority to grant the relief sought by plaintiffs. I believe the district court's judgment was correct. The panel opinion misconstrues the sixth amendment and disregards considerations of comity and federalism that underlie *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny, including our own decisions. The result of these errors is to place Georgia's state courts potentially under the direct supervision of a single federal district judge.

The panel opinion holds that the following allegations are sufficient to state a claim for injunctive relief (presumably enforceable by contempt) against the Governor of Georgia and *all* Georgia judges who preside over criminal trials of indigent defendants in the Georgia courts:

> [Plaintiffs] have alleged that systematic delays in the appointment of counsel deny them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hamper the ability of their counsel to defend them, and effectively deny them their eighth and fourteenth amendment right to bail, that their attorneys are denied investigative and expert resources necessary to defend them effectively, that their attorneys are pressured by courts to hurry their case to trial or to enter a guilty plea, and that they are denied equal protection of the laws.

Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir.1988). Plaintiffs' complaint asks the federal court to order defendants to pay indigent-defense lawyers more, to provide counsel earlier in the criminal process, and to provide more defense services and expert resources. I think that plaintiffs' sixth amendment allegations fail to state a claim upon which relief can be granted.[1]

---

[1] Our panel discussed only plaintiffs' sixth amendment claims. Therefore I do not address whether the complaint may have stated a sufficient claim based on either the eighth amendment or equal protection.

Two sentences form the linchpin of the panel's opinion: "The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment." *Id.* at 1017. No citation of authority follows these statements. More important, this view of the sixth amendment is inconsistent with the language and rationale of both *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), and *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984).

The sixth amendment is inextricably bound up with the fairness of a defendant's trial: "[T]he right to the effective assistance of counsel is recognized *not for its own sake*, but because of the effect it has on the ability of the accused to receive a *fair trial*." *Cronic*, 466 U.S. at 658, 104 S.Ct. at 2046 (emphasis added). "[T]he Sixth Amendment[']s purpose] is not to improve the quality of legal representation . . . . " *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, *any deficiencies* in counsel's performance *must be prejudicial* to the defense in order to *constitute ineffective assistance* under the Constitution." *Id.* at 691-92, 104 S.Ct. at 2067 (emphasis added). Thus, the sixth amendment right to counsel is not an abstract right to a particular level of representation; it is the right to the representation necessary for a fair trial. There can be no sixth amendment violation in the absence of prejudice at

a particular trial.[2] Put differently, if there is no prejudice, the alleged sixth amendment violation is not merely harmless; there is no violation at all.

Because prejudice is an essential element of any sixth amendment violation, sixth amendment claims cannot be adjudicated apart from the circumstances of a particular case. Put differently, no claim for relief can be stated in general terms as was attempted here. The sixth amendment does not lend itself to a rigid set of rules. For example, "the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial . . . ." *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940). Although plaintiffs allege that delays in the appointment of counsel deny them counsel at "critical stages" in the criminal process, this conclusory allegation fails to identify the "critical stage" at which Georgia systematically denies counsel to indigent defendants. This allegation is inadequate and does not put Georgia on notice of the alleged unconstitutional conduct. *See Frankos v. La Vallee*, 535 F.2d 1346 (2d Cir.1976); *see also Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987) ("allegations which are nothing more than broad, simple conclusory statements are in-

---

[2] The Supreme Court has said that in certain limited circumstances prejudice need not be proved but can be presumed. *See Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. Still, there must be prejudice (proven or presumed) in a specific case. Plaintiffs allege none of the circumstances that the Supreme Court has held may support a presumption of prejudice. Nor do they even allege that Georgia systematically engages in a specific practice which they say warrants a presumption of prejudice. Of course, no one claims that indigent defendants in Georgia are regularly tried without counsel.

sufficient to state a claim under § 1983"). But even if I assume that the complaint alleges a sixth amendment violation, I think the panel opinion is wrong.

The most troublesome aspect of this case is its disregard for federalism and comity between federal and state courts. The lower federal courts are not and ought not to be the general supervisors of state courts; yet this is what the complaint seeks. Lower federal courts—that is, district and circuit courts—can enforce the sixth amendment against the states; but the appropriate enforcement mechanism is post-conviction habeas corpus relief, operating on a case-by-case basis and grounded upon a finding of prejudice.

The state defendants contend that "considerations of federalism alone" would be enough to justify the district court's judgment and, in the district court, moved to dismiss per Fed.R.Civ.P. 12(b)(1), (2), and 6). But even if abstention has not been asserted expressly, the abstention doctrine is much more than a "pleader's option." *See Zwickler v. Koota*, 389 U.S. 241, 256, 88 S.Ct. 391, 400, 19 L.Ed.2d 444 (1967) (Harlan, J., concurring). The Supreme Court, on its own motion, has requested parties to brief the *Younger* abstention issue and refused to abstain only after both parties urged a decision on the constitutional merits. *See Sosna v. Iowa*, 419 U.S. 393, 396 n. 3, 95 S.Ct. 553, 556 n. 3, 42 L.Ed.2d 532 (1975). As stated in *Mitchell Family Planning Inc. v. City of Royal Oak*, 335 F.Supp. 738, 740 (E.D.Mich.1972), "[w]hile defendants have not argued [*Younger*] abstention, it is a matter which the court must consider when it is requested to act in a manner which may affect the sensitive area of federal-state relations."

Dismissal of the action pursuant to Fed.R.Civ.P. 12(b) is not only supported by precedent, but is mandated by case law of the Supreme Court and of this circuit. For example, in *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), the Supreme Court upheld the district court's dismissal of the action because plaintiffs failed to present an existing case or controversy and because they stated no adequate basis for equitable relief. *Younger's* principles of federalism and comity prevented the Court from granting the requested relief because the injunction would have been a "major continuing intrusion" of federal power into the daily operations of state criminal procedures. The action was thus properly dismissed because it failed to state a claim for which relief could be granted. Defendants have a right to avoid not only the judgment, but the process of defending themselves in federal courts; that is what Rule 12(b) is about. When the potential interference with state courts is unacceptable, a 12(b) dismissal is the appropriate reaction. What is said in *O'Shea* is on point here and summarizes my chief criticism of the panel opinion:

> What [plaintiff-respondents] seek is an injunction aimed at controlling or preventing the occurance of specific events that might take place in the course of future state criminal trials. The order the Court of Appeals thought should be available if respondents proved their allegations would be operative only where permissible state prosecutions are pending against one or more of the beneficiaries of the injunction. Apparently the order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners. This seems to us nothing less than an ongoing federal audit of

> state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris* and related cases sought to prevent.

414 U.S. at 500, 94 S.Ct. at 678, 38 L.Ed.2d at 686.

I know that a panel of this court once in the past granted prospective relief to secure constitutional standards in state criminal proceedings, but that case did not involve sixth amendment ineffectiveness of counsel claims. In *Pugh v. Rainwater*, 484 F.2d 778 (5th Cir.1973), *rev'd in part on other grounds sub nom. Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), the Fifth Circuit held that Younger considerations did not preclude granting relief to a class of pre-trial detainees challenging Florida's procedure of pre-trial detention without a probable cause hearing. *Rainwater*, however, does not support prospective relief for every claim of constitutional violations in state criminal proceedings. The Fifth Circuit wrote, "[w]e have never intimated that abstention is appropriote where there is no state court prosecution to be interfered with and where the plaintiff seeking relief in federal court has no alternative forum in which to raise his constitutional claim." 483 F.2d at 782 (quoting *Morgan v. Wofford*, 472 F.2d 822, 826 (5th Cir.1972)). The court then found that abstention was not required because the plaintiffs' pre-trial incarceration would have ended as of the time of trial, leaving them with no remedy; each claim to a pre-trial preliminary hearing would be mooted by conviction or exoneration.

Luckey is a different case. Equity need not intervene immediately in plaintiffs' state trials. Plaintiffs have an

adequate remedy *at law* for any ineffective assistance of counsel they may actually receive. Most important, they can present objections to sixth amendment violations at their state trials and in their state appeals. "They [also] can challenge the legality of their custody via federal habeas corpus, subject, of course, to prior exhaustion of state remedies." *Gardner v. Luckey*, 500 F.2d 712, 715 (5th Cir. 1974).

Not only is the panel decision unsupported by Eleventh Circuit precedent, I think it conflicts with prior cases. In *Gardner v. Luckey*, a class of defendants asked the court for an injunction ordering the Florida Public Defenders Offices to pay higher salaries, provide representation at earlier stages of criminal proceedings, and reduce caseloads of individual attorneys. In affirming the district court's dismissal of the action at the pleading stage, Judge Godbold wrote for the panel that "[t]his case bears a strong resemblance to *O'Shea v. Littleton*." *Id.* at 714. "It is clear from the face of the complaint that our appellants contemplate exactly the sort of intrusive and unworkable supervision of state judicial processes condemned in *O'Shea*." *Id.* at 715.

In *Tarter v. Hury*, 646 F.2d 1010 (5th Cir.Unit A 1981), the court expressly concluded that the federalism and comity considerations of *O'Shea* applied to the claim that Galveston County, Texas provided ineffective court-appointed counsel. According to the court, "[g]ranting and enforcing the equitable relief sought by Tarter to remedy those alleged improprieties would require the same anticipatory interference condemned in *O'Shea*." *Id.* at 1013 n.

5 (affirming the district court's dismissal of the action before pleadings were served on defendants).

A case similar to *Luckey* but from another circuit is *Wallace v. Kern*, 499 F.2d 1345 (2d Cir.1974). The words of the Second Circuit in the context of that speedy trial case seem apt in the context of this effective assistance of counsel case:

> This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the state courts. Rather, the federal courts must limit their inquiry to the specific facts regarding a complaining petitioner. Relief from unconstitutional delays in criminal trials is not available in wholesale lots. Whether an individual has been denied his right to a speedy trial must be determined ad hoc on a case-by-case basis.

Id. at 1351.

If plaintiffs state a claim for injunctive relief here, federal habeas corpus need not exist. We could simply and broadly enjoin all state court judges to apply the Constitution as we dictate; monitor the state judges' performance; allow criminal defendants in the midst of state proceedings to come to federal court to seek enforcement of our injunction; and, if need be, hold state court judges in contempt for not doing as we say. When we embark on this new course, we must prepare to face this unpleasant question: If a state judge does not obey a district judge's injunction, are we willing to jail the state judge for contempt? Avoidance of this unseemly conflict between

state and federal judges is one reason for *O'Shea and Younger*.

It may well be that Georgia ought to reform the way it finances and otherwise provides counsel to indigent defendants. If reforms are not undertaken, it may well be that more and more state prisoners will have thier convictions voided on sixth amendment grounds by state and federal courts. But, for now, this is Georgia's business: the business of Georgia's judges, legislators, and voters. While the lower federal courts are protectors of constitutional rights, that power does not make us the general superintendents of state court systems. I think the panel decision in this case is wrong, and I regret that a whole court has had no chance to study the case fully.

I would grant a rehearing in banc.

Supreme Court, U.S.
FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1516

IN THE

Supreme Court of the United States

October Term, 1989

JOE FRANK HARRIS, Governor of the State of Georgia, et al.,

Petitioners,

vs.

HORACE LUCKEY, et al., etc.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

DAVID A. WEBSTER
(COUNSEL OF RECORD)
SUMNER & HEWES
THE HURT BUILDING
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STATEMENT OF THE CASE

Respondents' take issue with Petitioners' statement of the case in crucial ways which bear on the issues properly before this Court. (Hereinafter Petitioners' will be referred to as "Defendants" and Respondents as "Plaintiffs.")

First, this is not an action against the "State of Georgia." See Petition (hereinafter "Pet."), 5, 6-7. Plaintiffs sued the governor and judges, the latter being responsible for oversight of the criminal judicial process, including the representation of indigents. Plaintiffs sued defendants who implement the challenged actions, and against whom remedies can be enforced.

Second, this is not an action whose "bottom line" is "an injunction expressly requiring expenditure of money." Pet. 8.

Plaintiffs were requested by the district court to specify what remedies were possible which would not violate the Eleventh Amendment. Plaintiffs filed with the court a brief listing a number of remedies the court could enforce, showing that only as a last resort would ordering of expenditure of money become an issue. Plaintiffs listed (1) a declaratory judgment setting out the violations of plaintiffs' rights with direction that defendants comply with the constitution, (2) an order adopting constitutional standards with directions that defendants comply, (3) an order directing implementation of specific remedies and (4) an injunction requiring expenditure of money.[1] While an order expressly requiring the expenditure of

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1. Plaintiffs' Brief in Response to Court's Order Reconsidering Dismissal, filed October 19, 1987.

money is within the authority of an Article III court, this litigation would never reach that stage unless defendants exhibited obstinacy beyond the remedial power of lesser sanctions. Spallone v. United States, 493 U.S. ___, 110 S.Ct. 625 (1990).

SUMMARY OF ARGUMENT

The petition does not present "special and important reasons" favoring review. Sup.Ct. Rule 10.1. The decision below is consistent with those of this Court and of other courts of appeals. In addition, there are substantial procedural reasons to deny the writ of certiorari regardless of the issues at stake. This action is not ripe for review. The decision of the court of appeals reversed the trial court's dismissal for failure to state a claim and remanded for further proceedings.

I. THIS ACTION IS NOT RIPE FOR SUPREME COURT REVIEW.

This case is not ripe for review. The court of appeals remanded to the district court. 14a. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967).

Three separate concerns make Supreme Court review premature. First, this action may yet be resolved below on factual grounds; no trial on the merits has been held. Second, the questions presented simply cannot be answered in the abstract. Only the precise remedy ultimately entered can be measured against Eleventh Amendment and comity concerns.

Third, as the district court has noted on remand, ""[t]he time for filing the answer is not entirely clear given the

various proceedings at the trial and appellate levers, but the Court notes than an answer has not been filed." Order of March 21, 1990 (appended hereto). Another month has passed and defendants still have not filed an answer. The issues defendants seek to present to this Court may be mooted by their procedural default.[2]

A. The Facts of this Action Are Not Yet Resolved.

The need for this Court's review may be obviated by development of the facts. The parties have never had a trial in which a finder of fact could explore the evidentiary bases for plaintiffs' claims. Cf. Dept. of Labor v. Triplett, ___ U.S. ___, 58 U.S.L.W. 4388 (U.S. Mar. 27,

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2. Pending before the trial court is plaintiffs' request to enter a default for defendants' failure to file their answer within 10 days of the court of appeals' mandate which was returned over three months ago.

1990). This litigation terminated at such an early stage that defendants have not yet answered plaintiffs' complaint, let alone submitted to discovery.

This appeal is from the final judgment only in the most technical of senses. The effect of the court of appeals' reversal is now to permit discovery and trial on the issues--after issue has been joined.

This case therefore carries a heavy presumption against immediate review. The writ of certiorari is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision .... And, except in extraordinary cases, the writ is not issued until final decree." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916).

B. Review of Petitioners' Issues is Premature.

This petition is premature because petitioners' questions presented will necessarily be shaped by the exact relief ultimately entered in the trial court. This is most obvious as to the suggested Eleventh Amendment and comity issues. The permissibility of the relief in the face of the Eleventh Amendment is a function of all of the following factors: (1) the substantive grounds upon which relief is entered, see, e.g., Papasan v. Allain, 478 U.S. 265, 278-82 (1986); (2) the type of remedy entered, Edelman v. Jordan, 415 U.S. 651 (1974); and (3) the identity of the addressee of relief, Ex parte Young, 209 U.S. 123 (1908). Comity concerns similarly depend upon the facts of each case. Missouri v. Jenkins, ___ U.S. ___, 58 U.S.L.W. 4480 (U.S. Apr. 18, 1990); Pulliam v. Allen, 466 U.S. 522 (1984). As

plaintiffs' discussion of the merits will show, the appropriate remedy or remedies remains an open issue. Until relief is entered, abstract discussion of remedial possibilities is an unnecessary exercise. It is also contrary to the restraint usually exercised by this Court as to such abstract questions:

> No rule of practice of this Court is better settled than "never to anticipate a question of constitutional law in advance of the necessity of deciding it."

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 71-72 (1961)(citations omitted).

Defendants present "a variety of hypothetical controversies which may never become real. [This Court is being] invited to enter into a speculative inquiry for the purpose of condemning [remedy] provisions the effect of which in concrete situations, not yet developed,

cannot now be definitely perceived. [This Court should] decline that invitation." Electric Bond & Share Co. v. SEC, 303 U.S. 419, 443 (1938).

II. THIS ACTION RAISES NO "SPECIAL AND IMPORTANT' ISSUES.

The petition does not demonstrate grounds for issuance of a writ of certiorari. Review ordinarily is granted only in the circumstances specified in Rule 10.1: (1) "conflict with the decision of another United States court of appeals on the same matter," (2) decision on "an important question of federal law which has not been, but should be settled by this Court" or (3) "conflict with the applicable decisions of this Court." None of these grounds is satisfied here.

A. The Remedial Authority Issues Are Premature at Best.

Defendants ask this Court to assume in advance the type of remedy the district

court might choose. Any assumption about appropriate relief is speculative. Equity is a flexible tool, and the equitable decree above all is to be molded to fit the particulars of a given case. See, e.g., Spallone v. United States, 493 U.S. ___, 110 S.Ct. 625 (1990); Hutto v. Finney, 437 U.S. 678 (1978).

Defendants ask this Court to assume in advance not only that they will be willful violators of any simple decree, but also that the district court will violate the strictures of comity and the Eleventh Amendment. Given the recent opinions of this Court in Spallone and Missouri v. Jenkins, it is unlikely that any initial order of relief will stretch the limits of comity and the Eleventh Amendment. Such assumption is highly speculative and unfair to the trial judge. That court should have the

opportunity in the first instance to compare all possible relief against limitations on that relief.

> [The defendant's] position, we think, underestimates the ability of a federal court to formulate a decree that will grant the respondents the constitutional relief to which they may be entitled without oversteppinmg the limits of judicial power.

Hills v. Gautreaux, 425 U.S. 284, 301 (1976). Plaintiffs have proposed a range of conceivable relief. See Statement of The Case, supra. This Court's review of remedial issues would be premature.

B. The Eleventh Amendment Permits All Relief Necessary.

The Fourteenth Amendment permits the federal courts remedial powers against the states in matters of future compliance with the federal constitution. Ex parte Young, 209 U.S. 123 (1908). The Ex parte Young fiction permits a federal plaintiff to sue a state official, and thereby avoid

the immunity of the state, for purposes of enforcing federal rights. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984).

Directly contrary to defendants' claims, the Eleventh Amendment is no bar to a decree requiring the expenditure of money, so long as that decree is entered for the purpose of securing future compliance with constitutional mandates. Missouri v. Jenkins, supra; Milliken v. Bradley, 433 U.S. 267 (1977)(states required to participate in remedying racial segregation of local schools).

Defendants seem to have three objections to injunctive relief. The first is that, effectively, relief would run against the state. That was also the issue in Milliken v. Bradley, Missouri v. Jenkins and Ex parte Young, however. Defendants' argument is nothing less than

an attack on well settled principles of long standing.

Defendants' second objection appears to be formal. Defendants' apparently prefer an order against the state, if any ordered is to be entered. But the Ex parte Young fiction demands indirect suit against state officers. Moreover, this Court has expressed its impatience with hypertechnical matters of form in Eleventh Amendment fiction issues. Hutto v. Finney, 437 U.S. at 692.

Finally, defendants object that the governor should not be a defendant because he has no personal stake in this controversy. The entire argument misconceives Ex parte Young. The point of suing the governor is not to establish personal responsibility, but rather to bring in an Ex parte Young surrogate for the state. The governor's personal role is quite

irrelevant. Under Ex parte Young, the defendant need only, "by virtue of his office, ha[ve] some connection" with the statute or conduct under scrutiny. ""[W]hether [this connection] arises out of general law, or is specially created by the act itself, is not material so long as it exists." 209 U.S. at 157.[3]

The governor is a proper defendant, and is subject to suit as a representative

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3. Despite defendants' protestations, the court of appeals found as a matter of state law that the governor has overall responsibility for law enforcement and for criminal prosecutions. 8a. See, Papasan v. Allain, 487 U.S. 265, 282, n. 14 (1986)("general supervision"). Moreover, the governor is a suitable defendant where the state has defaulted in its constitutional duty. See Wallace v. Jaffree, 466 U.S 924 (1984)(governor among others); Milliken v. Bradley, supra (same); Fortson v.Dorsey, 379 U.S. 433 (1965)(secretary of state); Reynolds v. Sims, 377 U.S. 533 (1964)(same); Williams v. Wallace, 240 F.Supp. 100, 110 (M.D.Ala. 1965) (governor).

of the state despite the Eleventh Amendment.

C. Injunctive Relief May Be Entered Against State Judges.

Defendants argue that federal injunctive relief against state court judges is inherently so disruptive as to be beyond the pale. This Court has already rejected that very proposition for purposes of the absolute immunity doctrine. "We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." Pulliam v. Allen, 466 U.S. 522, 541-42 (1984). Defendants appear to disclaim the Eleventh Amendment as a bar to relief against judges, and to rely instead upon general notions of comity and federalism. But the decisions they cite lend no support to the general proposition that prospective relief is barred. Younger

v. Harris, 401 U.S. 37 (1971), holds that the federal courts ordinarily are barred from restraining ongoing state prosecutions, regardless of whether a judge or someone else is restrained. Younger does not forbid prospective injunctions to guarantee criminal process rights where no prosecution is restrained. Gerstein v. Pugh, 420 U.S. 103, 108, n. 9 (1974).

O'Shea v. Littleton, 414 U.S. 488 (1974) is likewise inapplicable here. As this Court noted in O'Shea:

> Apparently the order would contemplate interruption of state proceedings to adjudicate assertions of noncompliance by petitioners... A federal court should not intervene to establish the basis for future intervention that would be so intrusive and unworkable.

Id. at 500. Plaintiffs do not request an order either aimed at interruption of individual prosecutions. Furthermore the very existence of the O'Shea decision

assures that the district court would not enter such an order. Any possible relief here is like that in Gerstein v. Pugh, where "[t]he injunction was not directed at the state prosecutions as such, but only at [constitutionally required protections]...that could not be raised in defense of the criminal prosecution. The order...could not prejudice the conduct of the trial on the merits." 414 U.S. at 108, n. 9.

Defendants fall short of assigning conflict in circuits as a reason for granting the writ, but do argue there is a conflict and mention three cases. Pet. 19, 20. Tarter v. Hury, 646 F.2d 1010 (5th Cir. Unit A 1981) and Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974), present no conflict for the simple reason that they are opinions of the same circuit that decided the instant case. The Fifth

Circuit became the Fifth and Eleventh Circuit when the administrative units split in late 1981. Decisions of the former Fifth Circuit are treated as precedent even now in the Eleventh Circuit.[4] The court of appeals' refusal to consider this case en banc signals clearly the lack of significant internal conflict among these three opinions. Even without such a signal, this Court ordinarily does not grant certiorari to resolve intracircuit conflicts. See Davis v. United States, 417 U.S. 333, 340 (1974).

The only case defendants cite from

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4. The Eleventh Circuit's boilerplate footnote when citing a former Fifth Circuit case is: "This [Fifth Circuit] case was decided prior to the close of business on September 30, 1981, and is binding precedent under Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981)." DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1507 n. 9 (11th Cir. 1989).

another circuit is Wallace v. Kern, 499 F.2d 1345 (2nd Cir. 1974). Despite defendants' general assertion that Wallace conflicts with the decision below, it conflicts in dicta only. And whatever that case suggests about federal court challenges to state criminal practices, it does not support defendants' contention that federal courts cannot enforce orders to correct constitutional violations by state judicial systems. The subsequently decided cases of Gerstein v. Pugh, 420 U.S. 103 (1975) and Pulliam v. Allen, 466 U.S. 522 (1984) belie such claim.

In short, an appropriate injunction may be entered against the defendant judges consistent with comity and Eleventh Amendment concerns.

D. Injunctive Relief May Enforce Sixth Amendment Rights.

Defendants present the question "[w]hether respondents have presented a

viable and justiciable claim for injunctive relief to prevent anticipated future Sixth Amendment...violations." Questions Presented, Pet. i. Plaintiffs have presented just such a claim.[5]

Gerstein v. Pugh, 420 U.S. 103 (1974), approved use of the injunction as a remedy to prevent future violation of procedural rights in the criminal process. The concurring opinion summed up the result of the Gerstein decision:

> Because Florida does not provide all defendants in custody pending trial with a fair and reliable determination of probable cause for their detention, the respondents and the members of the class they represent are entitled to declaratory and injunctive relief.

Id. at 126.

Gerstein is but an application of

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5. Also pending below are Eighth Amendment and equal protection claims which neither the district court nor the court of appeals addressed. 10a, n.1.

age-old equitable principles. Preventive injunctions are designed to avoid threatened harm before it occurs. Swift & Co. v. United States, 272 U.S. 311, 326 (1928); Vicksburg Waterworks Co. v. Vicksburg, 184 U.S. 65, 82 (1902). An injunctive plaintiff bears the usual burdens to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." O'Shea v. Littleton, 414 U.S. 488 (1974).

Defendants invite this Court to hold that even if an injunctive plaintiff can meet these ordinary standards for issuance of the chancellor's decree, he or she is nonetheless not entitled to the ordinary relief. Defendants cite Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984) as supporting that proposition. Neither

Strickland nor Cronic, however, is inconsistent with the relief plaintiffs seek below.

Defendants purport to find in these decisions a general rule that "judicial determinations can only be made on a case-by-case basis in the context of a specific legal proceeding or trial." Pet. 22. In so arguing, defendants confuse issues of relief and issues of substance.

What Strickland and Cronic hold is that a particular remedy, namely post-conviction relief, is unavailable unless a given criminal defendant makes an individualized showing. Strickland makes clear several times that the Court was concerned there only with post-conviction relief. 466 U.S. at 671, 684, 687, 691.

Plaintiffs seek not reversal but prevention. Traditionally, that distinction is crucial in deciding not only

appropriate relief but also appropriate tests for judging relief. The values of repose almost always require a higher showing for reversing completed action, especially completed judicial action, than for preventing harm before hand. Compare Reynolds v. Sims, 377 U.S. 533, 561-52 (1964) and Nixon v. Herndon, 273 U.S. 536 (1927)(prospective relief to prevent racially discriminatory elections), with Toney v. White, 488 F.2d 310, 314 (5th Cir. 1973)(en banc)(decree setting aside election normally requires possible outcome difference); compare United States v. Balistrieri, 779 F.2d 1191, 1204-05 (7th Cir. 1985)(appellate mandamus available to assure appearance of impartial trial), with United States v. Murphy, 768 F.2d 1518, 1539-41 (7th Cir. 1985)(no post-conviction review for mere appearance of judge's partiality); but cf. Peralta v.

Heights Med. Ctr., 485 U.S. 80 (1988) (failure of due process notice requires setting aside civil judgment, even without showing of possible outcome effect).

Indeed, defendants appear to concede that some Sixth Amendment violations are subject to anticipatory relief. Pet. 21. They argue only about which ones are amenable to such relief. They somehow argue that injunctive relief is appropriate only for per se violations, that is, for cases of either declared state policy or complete abdication of duty. This argument also flies in the face of Gerstein v. Pugh, supra, which permitted relief although unconstitutional trial procedures were merely likely, not mandated or universal.[6]

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6. In Gerstein, after amendment of the originally-challenged procedures, "a defendant charged by information still

More generally, a court may tailor its decree to contemplate subtleties of substance and relief, including "the nature and extent of the constitutional violation," Milliken v. Bradley, 418 U.S. 717, 744 (1974)(emphasis added), Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15-16 (1978), to take account of such complexity that violation and remedial response are inherently intertwined, Hutto v. Finney, 427 U.S. 678, 685-86 (1978), or to respond to circumstances which by their nature call for incremental response, id. at 687. There is no basis for the argument that injunctions are designed only for wrongs so clear that no one could mistake them.

In summary, the petition shows no "special and important" reason for this

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could be detained pending trial without a judicial determination of probable cause." 420 U.S. at 109 (emphasis added).

Court's grant of certiorari. Defendants show no conflict between the result below and decisions of this Court or conflict with decisions of other courts of appeals. Finally, defendants present no important question of law which should be settled by this Court.

CONCLUSION

Because certiorari is premature, because the facts do not support review of the questions pressed by defendants, and because defendants have not demonstrated the existence of any of the three possible grounds for certiorari, the writ should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

Civil Action No.
4:86-cv-297-HLM

Filed March 21, 1990

HORACE LUCKEY, III, et al.,

Plaintiffs,

vs.

JOE FRANK HARRIS, Governor, et al.,

Defendants.

ORDER

Defendants move the Court to stay the proceedings pending the disposition of their petition for certiorari by the Supreme Court. Defendants maintain that good cause exists to grant the stay, in large part because the Court of Appeals' denial of en banc consideration of its reversal of this Court's dismissal of the action drew an extensive and heated dissent from four of the Eleventh Circuit judges.

Plaintiffs oppose the entry of a stay on both procedural and substantive grounds. Procedurally, Plaintiffs contend that this Court lacks authority to stay the appellate court's decision, and point out that the Eleventh Circuit has aleady denied Defendants' motion for a stay pending Supreme Court review of the case. Substantively, Plaintiffs argue that a stay is not warranted because Defendants have not shown either a likelihood of success on the merits of their certiorari petition or that they would be irreparably harmed if the case proceeds.

Given the potential magnitude of this unique case, the Court believes that the Eleventh Circuit should have stayed its mandate. Nevertheless, Plaintiffs are absolutely correct that such a stay can be obtained from the Eleventh Circuit or the

Supreme Court only. 28 U.S.C. § 2101(f); Sup.Ct.R. 44.2; Fed.R.App.P. 41(b); In re Stumes, 681 F.2d 524, 525 (8th Cir. 1982).

ACCORDINGLY, Defendants' motion to stay all proceedings pending is DENIED.[1]

IT IS SO ORDERED, this 21st day of March, 1990.

s/Harold L. Murphy

United States District Judge

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1. Plaintiffs have written the Clerk of this Court, requesting that default be entered due to Defendants' failure to file an answer. The time for filing the answer is not entirely clear given the various proceedings at the trial and appellate levels, but the Court notes that an answer has not yet been filed.

Supreme Court, U.S.
FILED
APR 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1516

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOE FRANK HARRIS, Governor, et al.,

Petitioners,

v.

HORACE LUCKEY, III, et al.

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF TEN STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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issue in state forums. State courts which try criminal cases would be placed in the tenuous, if not unnerving, posture of having the federal district court monitor day-to-day operations in search of sixth amendment violations, contrary to longstanding principles of equity, comity, and federalism.

The financial ramifications to the Amici States if certiorari is not granted and this case reversed, are enormous. Federal courts would be usurping the function of state legislatures by making determinations of how much indigent criminal defense attorneys are to be paid, and how funds and scarce resources should be allocated between the provision of criminal defense and other vital state concerns.

Finally, Amici States are seriously concerned that the panel opinion in the court below interprets the sixth amendment in a manner so inconsistent with this Court's precedent in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984), as to make an adjudication, or defense, of future claims of ineffective assistance of counsel unworkable in any court.

The Amici States support petitioners' contention that certiorari is due to be granted and the opinion below reversed on the grounds that it is violative of the Eleventh Amendment, is incompatible with proper concerns of equity, comity and federalism, and is in direct conflict with this Court's and other appeals courts' precedent.

SUMMARY OF THE ARGUMENT

Contrary to equity, comity, and federalism the decision below defies this Court's and other appeals courts' precedent by requiring states to defend whether a class of indigent criminal defendants -- in the midst of their state court criminal trials -- are receiving, or in the future will receive, effective assistance of counsel.

The sixth amendment protects the right to a fair trial and guarantees that a conviction will not be upheld if a criminal defendant is not afforded effective assistance of counsel and is thereby prejudiced. By construing the sixth amendment to confer rights upon criminal defendants which do not affect the outcome of the trial, the Eleventh

Circuit opinion implies that it is appropriate for federal district courts to assume equitable jurisdiction over criminal defendants and state judicial proceedings at any time, to supervise and monitor ongoing state criminal proceedings based solely upon allegations of anticipated ineffective assistance of counsel. Such a suit is without equity for there are availabile adequate remedies at law by means of appeal and collateral review should counsel's assistance prove ineffective.

As a matter of federalism, the relief contemplated by this action is simply not available. State trial and appellate judges -- the courts of first resort should any challenge to the effectiveness of counsel be made -- would

become subject to constant federal scrutiny, possibly even contempt proceedings in federal court, should state criminal defendants be permitted to initiate federal proceedings such as those contemplated here during the pendency of their state court criminal trial. The panel opinion completely ignores legitimate and longstanding concerns for equity, comity, and federalism traditionally accorded the states by the federal courts with respect to the administration of state courts, prosecution of their criminal laws, and allocation of state resources.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

A. The opinion below is in direct conflict with this Court's holdings in Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Cronic, 466 U.S. 648 (1984).

The sixth amendment requirement of effective assistance of counsel in criminal cases is a guarantee of the constitutional right to a fair trial. Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to determine whether the assistance rendered was constitutionally deficient, the defendant must show first that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment;" and second that the "deficient performance prejudiced

the defense." Strickland, 466 U.S. at 687.

The sixth amendment guarantees that the outcome of the criminal proceeding will be arrived at fairly through the adversarial process. The focus, therefore, will be on whether the allegedly ineffective assistance rendered affected the outcome of the proceeding, and not simply whether ineffective assistance was rendered. Without a finding of prejudice, there is no constitutional violation. Because a claim of ineffective assistance of counsel is inextricably intertwined with what occurs at trial, it is impossible that constitutional violations under the sixth amendment can be determined beforehand.

But the Eleventh Circuit in the case below held that the sixth amendment somehow guarantees more than the right to a fair trial.

> The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless, violate a defendant's rights under the sixth amendment.

Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988). Citing, as an example, Pugh v. Rainwater, 483 F.2d 778, (5th Cir. 1973), aff'd in part, reversed in part on other grounds sub nom. Gerstein v. Pugh, 420 U.S. 103 (1975), the lower court held that since the fourth amendment rights of pre-trial detainees to a timely judicial determination of probable cause could be the

basis for prospective equitable relief, so too could the sixth amendment rights of indigent criminal defendants.

In the context of fourth amendment violations, reliance on Gerstein v. Pugh makes sense, for the right not to be unreasonably detained without probable cause becomes moot after trial, there is no remedy. But the analogy makes little sense in the context of alleged sixth amendment violations, for the right to the "effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."

United States v. Cronic, 466 U.S. 648, 658 (1984).

What the Eleventh Circuit appears to have done is create a new civil cause of action for prospective equitable relief based upon allegations of future ineffective assistance of counsel, without any corresponding showing of inevitable prejudice. Compare Cuyler v. Sullivan, 446 U.S. 335 (1980), in which this Court held that actual, as opposed to potential, conflict of interests on the part of trial counsel representing multiple defendants must be shown before federal habeas corpus relief is available. There is no precedent for the proposition that anticipated ineffective assistance of counsel is remediable in a suit for prospective injunctive re-

lief; actual prejudice must be shown.

A similar novel attempt to create new sixth amendment rights has been tried before and expressly rejected by this Court. In Morris v. Slappy, 461 U.S. 1 (1983), the Court rejected a claim that the sixth amendment guarantees a "meaningful attorney-client relationship." Id. 461 U.S. at 14. Without citing authority, and without indicating what constitutional rights are at issue beyond the right to a fair trial, the Eleventh Circuit also interprets the sixth amendment in a novel way inconsistent with this Court's precedent.

This Court has also refused to apply a "per se" rule as to what level of effectiveness is to be expected in any given case, which would be required in

order to determine whether a violation can be expected to occur. "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." Strickland, 466 U.S. at 688. By suggesting that the sixth amendment protects rights which do not affect the outcome of the trial, the Eleventh Circuit effectively does away with the requirement of prejudice, negates the Strickland test of how to establish a constitutional violation based on ineffectiveness of counsel, and creates a novel and unprecedented cause of action.

B. The opinion below is in direct conflict with this Court's holdings in Younger v. Harris, 401 U.S. 37 (1971) and O'Shea v. Littleton, 414 U.S. 488 (1974).

This Court has long been hesitant to interfere with states' administration of their criminal laws. See, Avery v. State of Alabama, 308 U.S. 444 (1939). Petitioner has already briefly addressed the abstention doctrine under Younger v. Harris, 401 U.S. 37 (1971) and O'Shea v. Littleton, 414 U.S. 488 (1974); and Amici States will not belabor the point except to emphasize their concern, and in particular, the concern of the states' judiciaries should certiorari not be granted and the case reversed.

A number of concerns become readily apparent if a little thought is given as to what relief, if any, could be ordered

if respondents were to prove at trial that "systemic deficiencies" exist in the manner in which Georgia's indigent defense system is administered. Remedies of sixth amendment violations must be narrowly tailored to the injury. United States v. Morrison, 449 U.S. 361 (1981). Assuming that the Eleventh Amendment were no bar to a declaration that the amount of fees paid indigent defense counsel was insufficient under the sixth amendment, and assuming further that respondents could show that higher fees improved the adequacy or effectiveness of counsel, there remain claims outstanding against the defendant class of trial judges regarding the manner in which the court systems are administered.

Surely a federal court would not order the state trial judges to, for example, establish guidelines to measure the pending effectiveness of counsel appointed to indigent defendants. The concept of guidelines for trial courts to follow has been expressly rejected by this Court. Strickland, 466 U.S. at 688-689. Allegations of ineffective assistance of counsel must, by their very nature, be decided on a case-by-case basis. But assuming the district court did enter such an order, would every alleged failure on the part of trial counsel prompt a cause of action for criminal defendants to bring against the trial judge presiding over their case, ostensibly for failing to ensure the de-

sired level of effectiveness? See, O'Shea, 414 U.S. at 501-502.

Judge Edmondson's dissent from denial of rehearing en banc is persuasive: "If a state judge does not obey a district judge's injunction, are we willing to jail the state judge for contempt?" The chilling effect the prospect of federal contempt power looming over the heads of state judges in the daily administration of their courts would be overwhelming. This is the type of federal-state friction the abstention doctrine announced in Younger v. Harris and its progeny was intended to prevent.

An additional concern is what effect an adjudication of across-the-board ineffective assistance of counsel in federal court would have on the pending, as

well as disposed of, cases of the plaintiff class of indigent criminal defendants. Presumably, that would mean that the ineffectiveness prong of the Strickland test would already be adjudicated, or res judicata, with respect to any subsequent attack on a conviction. Worse, it would be res judicata with respect to any pending or impending trial of any present class member. Cf. Deakins v. Monaghan, 484 U.S. 193, 208 (1988) (White and O'Connor, JJ., concurring). Compare in this regard, Guerro v. Mulhearn, 498 F.2d 1249, 1254 (1st Cir. 1974).

But the cornerstone of the abstention doctrine is that the federal plaintiffs will suffer immediate and irreparable injury, and must have no remedy at

law. O'Shea, 414 U.S. at 502. The respondents clearly have an adequate remedy at law, by means of appeal in the state courts wherein they can raise the same claims or in postconviction collateral review. Id. There is no evidence or argument that state courts are not competent to entertain respondents' federal claims; state courts are in fact presumed competent. Cf. Chick Kam Choo v. Exxon Corp., 486 U.S. , (1988). To presume otherwise, as apparently did the Eleventh Circuit, is directly contrary to the dictates of Younger and O'Shea.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

As stated by the dissent in the court below and by the petitioners, the panel opinion is in direct conflict with a number of other courts of appeals' decisions including Gardner v. Luckey, 500 F.2d 712, 715 (5th Cir. 1974); Tarter v. Hury, 646 F.2d 1010 (5th Cir. Unit A. 1981); and Wallace v. Kern, 499 F.2d 1345 (2nd Cir. 1974). Amici States will not repeat the analysis. But the opinion below is in direct conflict with decisions of other courts of appeals as well.

In addition to those cited above, another case in direct conflict with the Eleventh Circuit's opinion in Luckey is Williams v. Rubiera, 539 F.2d 470 (5th

Cir. 1976), a declaratory judgment action against criminal judges in Dade County, Florida in which it was alleged that persons charged with welfare fraud were not being appointed counsel. The Fifth Circuit affirmed dismissal of the action on Younger abstention grounds, holding that plaintiff's claims could be presented to the state court. "An injunction against a trial without appointed counsel would, of course, be direct federal interference in the state criminal prosecution." And it expressly rejected the argument that the action was governed by Gerstein v. Pugh, distinguishing the fourth amendment pretrial rights from those directed at the fairness of the trial.

noted that as in O'Shea, the plaintiffs had adequate remedies at law and that "other less intrusive avenues of relief were available: appeal within the state system, federal habeas corpus relief, federal criminal prosecution of state judges." Parker, 626 F.2d at 7. The court further noted that "federal interference with the state proceedings would be as serious here as it was feared to be in O'Shea." Id. at 8. Like the Fifth Circuit in Williams, but contrary to the Eleventh Circuit's analysis in Luckey, the Sixth Circuit did not find the fourth amendment rationale in Gerstein v. Pugh controlling. Id.

Among plaintiffs/respondents' claims in Luckey are that they are "denied investigative and expert resources neces-

sary to defend them effectively." Luckey, 860 F.2d at 1018. If true, the relief contemplated would require the anticipatory measurement of some quantum of what resources are necessary in any given case. But the "standards to govern what is 'necessary to an adequate defense' are not susceptible of arbitrary articulation but can best be developed on a case by case basis. Schultz v. United States, 431 F.2d 907 at 913 (8th Cir. 1970) (concurring opinion). United States v. Theriault, 440 F.2d 713, 715 (5th Cir. 1971). The Eleventh Circuit apparently disagrees.

And in Mason v. State of Arizona, 504 F.2d 1345 (9th Cir. 1974), the court of appeals held that "such assistance is not automatically mandatory but rather

depends upon the need as revealed by the facts and circumstances of each case." Mason, 504 F.2d at 1352. Thus, while all are in agreement that particular cases may warrant access to certain resources, cf. Ake v. Oklahoma, 470 U.S. 68 (1985), the Eleventh Circuit's opinion, in holding that respondents have stated a claim upon which declaratory or injunctive relief can be granted prior to conviction, conflicts with the decisions of the Eighth, Ninth and former Fifth Circuits as to when that decision can be made.

III. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT

Another example of the potential conflict between state and federal judiciaries contemplated by the anticipated relief in this case involves the relationship between the state courts and attorneys who appear before them. Given the relief anticipated in this case, federal courts would be monitoring not only the actions of state judges, but closely scrutinizing the legal and tactical decisions of appointed counsel in any given case prior to conviction. This would necessitate the interposition of the federal courts between the state bench and its bar, clearly an unworkable remedy.

As suggested by the dissent in Luckey, federal habeas corpus would become unnecessary if criminal defendants were permitted to challenge the effectiveness of their counsel in the midst of criminal trials. Cf., Caplin & Drysdale, Chartered v. United States, 489 U.S. , at , n. 9 (1989) ("We see no reason why our cases such as Strickland v. Washington, 466 U.S. 668 (1984), are inadequate to deal with any such ineffectiveness where it arises.")

The question of compensation of appointed attorneys and appropriation of resources is one for the state legislature, not the courts. See, Wright v. State of Louisiana, 362 F.2d 95 (5th Cir. 1966); and see, Dolan v. United States, 351 F.2d 671 (5th Cir. 1965);

and United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), cert. denied 382 U.S. 978. The Eleventh Circuit's opinion conflicts with those decisions.

Similar issues have been raised in other courts, in which criminal defendants or their attorneys have attempted to tie the sixth amendment rights of indigent defendants to the amount of fees the appointed attorneys are paid. See, e.g., Martin County, Florida v. Makemson, et al., 491 So.2d 1109 (Fla. 1986), cert. denied. 479 U.S. 1043 (1987), in which the Florida Supreme Court struck down the maximum fee limitations for compensation to appointed attorneys in extraordinary cases on the grounds that, as applied, criminal defendants' sixth amendment rights may be

impaired. Justice White's dissent from denial of certiorari, 479 U.S. 1043, is sound argument why certiorari should be granted in Luckey.

If certiorari is not granted, the federal courts may next be subject to attack on the grounds that the fee schedule provided for in the Criminal Justice Act deprive criminal defendants of their sixth amendment rigths. In United States v. De La Cruz, 870 F.2d 1192 (7th Cir. 1989), the Seventh Circuit ruled against a sixth amendment challenge to the fee schedule under the Criminal Justice Act, 18 U.S.C. § 3006A, holding that "in return for membership in the professional bar, an attorney must accept court appointments to represent an indigent...in order to preserve

his Sixth Amendment right to counsel." De La Cruz, 870 F.2d at 1194. Citing Powell v. Alabama, 287 U.S. 45 (1932), the court noted the constitution does not even require compensation to appointed attorneys.

In accord with the Seventh Circuit that the quantity of compensation does not dictate the quality of representation and that it is the attorneys' professional obligation as members of the bar and officers of the court to represent their clients zealously without regard to the amount of fee are cases such as Sparks v. Parker, 368 So.2d 528 (Ala. 1979), appeal dismissed 444 U.S. 803 (1979); Ex parte Grayson, 479 So.2d 76 (Ala. 1985); People v. District Court of El Paso, 761 P.2d 206 (Colo.

1988); and State v. Rush, 46 N.J. 399, 217 A.2d 441 (1969). Accord, Mallard v. United States District Court of the Southern District of Iowa, 488 U.S. , (1989); see again, Powell v. Alabama, 287 U.S. 45. But the result of the Eleventh Circuit's decision directly conflicts with the presumption that appointed counsel, as officers of the court and members of a profession will serve their appointed clients effectively and competently.

Although this Court has never directly addressed the issue of whether a particular level of compensation can be constitutionally related to the effectiveness of counsel, or whether claims of anticipatory ineffective assistance of counsel are justiciable outside the

context of cases such as Strickland v. Washington and United States v. Cronic, it has in passing suggested otherwise. Cf., Mallard v. United States District Court, supra; Caplin & Drysdale, Chartered v. United States, supra; and Federal Trade Commission v. Superior Court Trial Lawyers Assoc., 489 U.S. (1990). If the petition for writ of certiorari is granted, those questions should be answered in the negative.

CONCLUSION

For the reasons stated by Petitioners and for the reasons stated above, the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted and the decision below reversed by this Honorable Court.

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